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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
BEFORE THE HONORABLE JOHN E. MUNTER, JUDGE
DEPARTMENT NO. 505

LESLIE J. WHITELEY AND)
LEONARD WHITELEY,)
PLAINTIFFS,)
VS.) NO. 303184
RAYBESTOS-MANHATTAN, INC., ET)
AL.,)
DEFENDANTS.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
WEDNESDAY, MARCH 8, 2000
(VOLUME 39, PAGES 5343-5472)

REPORTED BY: JUDITH ANN OSSA, CSR 2310
OFFICIAL REPORTER

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APPEARANCES:

FOR THE PLAINTIFFS:
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BY: MADELYN J. CHABER, ESQ.
ROBERT BROWN, ESQ.
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SAN FRANCISCO, CALIFORNIA 94111-5802
FOR THE DEFENDANT PHILIP MORRIS INCORPORATED:
SHOOK, HARDY & BACON LLP
BY: DAVID K. HARDY, ESQ.
GERALD V. BARRON, ESQ.
LUCY E. MASON, ESQ.
ONE MARKET, STEUART TOWER, NINTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-1310.

FOR THE DEFENDANT R.J. REYNOLDS TOBACCO COMPANY:

WOMBLE, CARLYLE, SANDRIDGE & RICE
BY: JEFFREY L. FURR, ESQ.
200 WEST SECOND STREET
WINSTON-SALEM, NORTH CAROLINA 27101
HOWARD, RICE, NEMEROVSKI, CANADY,
FALK & RABKIN
BY: H. JOSEPH ESCHER III
THREE EMBARCADERO CENTER, 7TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111-4065
FOR DEFENDANT METALCLAD INSULATION CORPORATION:
MISCIAGNA & COLOMBATTO
BY: GREGORY S. ROSSE, ESQ.
27 MAIDEN LANE, 4TH FLOOR
SAN FRANCISCO, CALIFORNIA 94108

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WEDNESDAY, MARCH 8, 2000

9:05 A.M

(THE FOLLOWING PROCEEDINGS WERE HELD IN THE COURTROOM, IN THE PRESENCE OF THE JURY)

THE COURT: OKAY. GOOD MORNING, JURORS. I'M GOING TO NOW READ YOU THE JURY INSTRUCTIONS ABOUT THE LAW THAT APPLIES TO THIS CASE.

AS I INDICATED TO YOU AT THE VERY OUTSET OF THE CASE, I'M GOING TO MAKE A WRITTEN COPY OF THESE JURY INSTRUCTIONS AVAILABLE TO YOU IN THE JURY ROOM DURING THE COURSE OF YOUR DELIBERATIONS.

THE INSTRUCTIONS ARE RELATIVELY LENGTHY, AND I'D ESTIMATE THAT IT'S PROBABLY GOING TO TAKE ME ON THE

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ORDER OF
13 AN HOUR TO A LITTLE BIT MORE THAN AN HOUR TO READ THEM
ALL
14 TO YOU.
15 AND COUNSEL, AS I GO THROUGH THESE
INSTRUCTIONS,
16 IF I MISREAD AN INSTRUCTION OR YOU NOTICE A
TYPOGRAPHICAL OR
17 SIMILAR STENOGRAPHIC KIND OF ERROR, PLEASE FEEL FREE
TO
18 INTERRUPT ME, AND PLEASE DO IT AT THE TIME THAT I'M
READING
19 THE INSTRUCTIONS, SO THAT WE DON'T NEED TO GO BACK TO
THEM
20 AGAIN.
21 BEFORE I GET TO THE INSTRUCTIONS, JURORS, I
WANT
22 TO TELL YOU ONE OTHER THING. IN YOUR ABSENCE, LARGELY
FOR
23 YOUR CONVENIENCE, I HANDLED SOME OF THE ADMISSIBILITY
ISSUES
24 CONCERNING SOME OF THE DOCUMENTS. AND IN YOUR
ABSENCE, I
25 RECEIVED SOME DOCUMENTS INTO EVIDENCE, LARGELY TO SAVE
YOU
26 FROM HAVING TO BE PRESENT DURING THAT PROCESS.
27 SOME OF THOSE DOCUMENTS THAT WERE RECEIVED
INTO
28 EVIDENCE AND, OF COURSE, YOU MAY HEAR ABOUT THEM
DURING THE
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1 COURSE OF THE CLOSING ARGUMENTS BY THE LAWYERS, SOME
OF THEM
2 HAVE DELETIONS; THAT IS TO SAY, THEY HAVE MATERIAL
THAT HAS
3 BEEN TAKEN OUT OF THEM OR REDACTED FROM THEM.
4 THOSE MATERIALS THAT WERE DELETED OR
REDACTED ARE
5 IRRELEVANT TO THE CASE. SO MY INSTRUCTION TO YOU IS,
DON'T
6 SPECULATE ABOUT WHAT ANY OF THE REMOVED MATERIAL WAS
OR AS
7 TO THE REASONS FOR THE REMOVAL. ALL OF THAT HAS
NOTHING TO
8 DO WITH THE CASE AND NOTHING TO DO WITH ANY ISSUES
THAT ARE
9 BEING PUT TO YOU IN THIS CASE.
10 OKAY. HERE WE GO ON THE JURY INSTRUCTIONS.
11 "LADIES AND GENTLEMEN OF THE JURY:
12 IT IS NOW MY DUTY TO INSTRUCT YOU ON THE
LAW THAT
13 APPLIES TO THIS CASE. IT IS YOUR DUTY TO
FOLLOW
14 THE LAW.
15 AS JURORS, IT IS YOUR DUTY TO DETERMINE THE
16 EFFECT AND VALUE OF THE EVIDENCE AND TO
DECIDE
17 ALL QUESTIONS OF FACT.
18 YOU MUST NOT BE INFLUENCED BY SYMPATHY,
PREJUDICE
19 OR PASSION.
20 "MY INSTRUCTIONS WILL BE IN THREE PARTS:
FIRST,

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SOME INSTRUCTIONS ON THE GENERAL RULES WHICH
CONTROL THE JURY'S DUTIES IN A CIVIL CASE;
SECOND, THE INSTRUCTIONS THAT DEFINE THE ELEMENTS
OF THE CASE WHICH MUST BE ESTABLISHED; AND THIRD,
SOME RULES AND GUIDELINES REGARDING YOUR
DELIBERATIONS."
WITH RESPECT TO THOSE THREE CATEGORIES, I'M GOING
TO GIVE YOU THE INSTRUCTIONS IN THE FIRST TWO CATEGORIES
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BEFORE THE CLOSING ARGUMENTS BY THE LAWYERS. THERE ARE
GOING TO BE A FEW REMAINING INSTRUCTIONS IN THE THIRD
CATEGORY THAT COVER RULES AND GUIDELINES REGARDING YOUR
DELIBERATIONS. I'M GOING TO SAVE THOSE AND GIVE THOSE
INSTRUCTIONS TO YOU AFTER THE LAWYERS COMPLETE THEIR CLOSING
ARGUMENTS.
"YOU MUST DECIDE ALL QUESTIONS OF FACT IN THIS
CASE FROM THE EVIDENCE RECEIVED IN THIS TRIAL AND
NOT FROM ANY OTHER SOURCE. YOU MUST NOT MAKE ANY
INDEPENDENT INVESTIGATION OF THE FACTS OR THE LAW
OR CONSIDER OR DISCUSS FACTS AS TO WHICH THERE IS
NO EVIDENCE. THIS MEANS, FOR EXAMPLE, THAT YOU
MUST NOT ON YOUR OWN CONDUCT EXPERIMENTS OR
CONSULT REFERENCE WORKS FOR ADDITIONAL
INFORMATION."
WOULD YOU PLEASE BE SEATED.
"IF ANY MATTER IS REPEATED OR STATED IN DIFFERENT
WAYS IN MY INSTRUCTIONS, NO EMPHASIS IS
INTENDED.
DO NOT DRAW ANY INFERENCE BECAUSE OF A
REPETITION.
DO NOT SINGLE OUT ANY INDIVIDUAL RULE OR
INSTRUCTION AND IGNORE THE OTHERS. CONSIDER ALL
THE INSTRUCTIONS AS A WHOLE AND EACH IN THE LIGHT
OF THE OTHERS.
THE ORDER IN WHICH THE INSTRUCTIONS ARE GIVEN HAS
NO SIGNIFICANCE AS TO THEIR RELATIVE IMPORTANCE.
"STATEMENTS OF COUNSEL ARE NOT EVIDENCE; HOWEVER,
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IF COUNSEL HAVE STIPULATED TO A FACT, OR A FACT
HAS BEEN ADMITTED BY COUNSEL, ACCEPT THAT FACT AS
HAVING BEEN CONCLUSIVELY PROVED.

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DO NOT SPECULATE AS TO THE ANSWERS TO QUESTIONS TO WHICH OBJECTIONS WERE SUSTAINED OR THE REASONS FOR THE OBJECTIONS.

DO NOT CONSIDER ANY EVIDENCE THAT WAS STRICKEN; STRICKEN EVIDENCE MUST BE TREATED AS THOUGH YOU HAD NEVER KNOWN OF IT.

A SUGGESTION IN A QUESTION IS NOT EVIDENCE UNLESS IT IS ADOPTED BY THE ANSWER. A QUESTION BY ITSELF IS NOT EVIDENCE. CONSIDER IT ONLY TO THE EXTENT IT IS ADOPTED BY THE ANSWER.

"THE FACT THAT A CORPORATION IS A PARTY MUST NOT PREJUDICE YOU IN YOUR DELIBERATIONS OR IN YOUR VERDICT.

DO NOT DISCRIMINATE BETWEEN A CORPORATION AND NATURAL INDIVIDUALS. EACH IS A PERSON IN THE EYES OF THE LAW AND ENTITLED TO THE SAME FAIR AND IMPARTIAL CONSIDERATION AND TO JUSTICE BY THE SAME LEGAL STANDARDS.

"THE PRONOUN FORM AS USED IN THESE INSTRUCTIONS, IF APPLICABLE AS SHOWN BY THE TEXT OF THE INSTRUCTION AND THE EVIDENCE, APPLIES TO A CORPORATION.

"THE PLAINTIFFS IN THIS CASE ARE LESLIE WHITELEY AND LEONARD WHITELEY. THE DEFENDANTS ARE METALCLAD INSULATION CORPORATION, PHILIP MORRIS

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INCORPORATED, AND R.J. REYNOLDS TOBACCO COMPANY.

AS USED IN THESE INSTRUCTIONS, WORDS 'PLAINTIFF' AND 'DEFENDANT' APPLY TO EACH PLAINTIFF AND TO EACH DEFENDANT, RESPECTIVELY, EXCEPT AS YOU MAY BE OTHERWISE INSTRUCTED.

"DEFENDANTS METALCLAD INSULATION, PHILIP MORRIS AND R.J. REYNOLDS ARE CORPORATIONS AND AS SUCH CAN ACT ONLY THROUGH THEIR OFFICERS AND EMPLOYEES. ANY ACT OR OMISSION OF AN OFFICER OR EMPLOYEE WITHIN THE SCOPE OF AUTHORITY OR EMPLOYMENT IS IN LAW THE ACT OR OMISSION OF SUCH CORPORATION.

"EVIDENCE MEANS TESTIMONY, WRITINGS, MATERIAL

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OBJECTS OR OTHER THINGS PRESENTED TO THE SENSES
AND OFFERED TO PROVE THE EXISTENCE OR
NONEXISTENCE OF A FACT.
EVIDENCE IS EITHER DIRECT OR CIRCUMSTANTIAL.
DIRECT EVIDENCE PROVES A FACT WITHOUT AN
INFERENCE AND, IF TRUE, CONCLUSIVELY ESTABLISHES
THAT FACT. CIRCUMSTANTIAL EVIDENCE PROVES A FACT
FROM WHICH AN INFERENCE OF THE EXISTENCE OF
ANOTHER FACT MAY BE DRAWN. AN INFERENCE IS A
DEDUCTION OF FACT THAT MAY LOGICALLY AND
REASONABLY BE DRAWN FROM ANOTHER FACT OR GROUP OF
FACTS ESTABLISHED BY THE EVIDENCE.
THE LAW MAKES NO DISTINCTION BETWEEN DIRECT AND
CIRCUMSTANTIAL EVIDENCE AS TO THE DEGREE OF PROOF
REQUIRED; EACH IS A REASONABLE METHOD OF PROOF.

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EACH IS RESPECTED FOR SUCH CONVINCING FORCE AS IT
MAY CARRY.
"YOU ARE NOT REQUIRED TO DECIDE ANY ISSUE
ACCORDING THE TESTIMONY OF A NUMBER OF WITNESSES,
WHICH DOES NOT CONVINCE YOU, AS AGAINST THE
TESTIMONY OF A SMALLER NUMBER OR OTHER EVIDENCE,
WHICH IS MORE CONVINCING TO YOU. THE TESTIMONY
OF ONE WITNESS WORTHY OF BELIEF IS SUFFICIENT TO
PROVE ANY FACT. THIS DOES NOT MEAN THAT YOU ARE
FREE TO DISREGARD THE TESTIMONY OF ANY WITNESS
MERELY FROM CAPRICE OR PREJUDICE, OR FROM A
DESIRE TO FAVOR EITHER SIDE. IT DOES MEAN THAT
YOU MUST NOT DECIDE ANYTHING BY SIMPLY COUNTING
THE NUMBER OF WITNESSES WHO HAVE TESTIFIED ON THE
OPPOSING SIDES. THE TEST IS NOT THE NUMBER OF
WITNESSES, BUT THE CONVINCING FORCE OF THE
EVIDENCE.
"IF WEAKER AND LESS SATISFACTORY EVIDENCE IS
OFFERED BY A PARTY, WHEN IT WAS WITHIN SUCH
PARTY'S ABILITY TO PRODUCE STRONGER AND MORE
SATISFACTORY EVIDENCE, THE EVIDENCE OFFERED
SHOULD BE VIEWED WITH DISTRUST.
"IF YOU FIND THAT PARTY WILLFULLY SUPPRESSED
EVIDENCE IN ORDER TO PREVENT ITS BEING

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PRESENTED
25 IN THIS TRIAL, YOU MUST CONSIDER" -- EXCUSE
ME.
26 THAT'S INCORRECT. LET ME START THAT OVER.
27 "IF YOU FIND THAT A PARTY WILLFULLY
SUPPRESSED
28 EVIDENCE IN ORDER TO PREVENT ITS BEING
PRESENTED
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1 IN THIS TRIAL, YOU MAY CONSIDER THAT FACT
IN
2 DETERMINING WHAT INFERENCES TO DRAW FROM
THE
3 EVIDENCE.
4 "IN DETERMINING WHAT INFERENCES TO DRAW
FROM THE
5 EVIDENCE, YOU MAY CONSIDER, AMONG OTHER
THINGS, A
6 PARTY'S FAILURE TO EXPLAIN OR TO DENY SUCH
7 EVIDENCE.
8 "CERTAIN EVIDENCE WAS ADMITTED FOR A
LIMITED
9 PURPOSE. DO NOT CONSIDER IT FOR ANY OTHER
10 PURPOSE.
11 YOUR ATTENTION WAS CALLED TO THESE MATTERS
WHEN
12 THE EVIDENCE WAS ADMITTED.
13 "TESTIMONY HAS BEEN READ OR PLAYED ON
VIDEOTAPE
14 FROM DEPOSITIONS AND PRIOR TRIALS. A
DEPOSITION
15 IS TESTIMONY TAKEN UNDER OATH BEFORE THE
TRIAL
16 AND PRESERVED IN WRITING OR ON VIDEOTAPE.
YOU
17 MUST CONSIDER ALL THE PRIOR TESTIMONY AS IF
IT
18 HAD BEEN GIVEN HERE IN COURT.
19 "AN INTERROGATORY IS A WRITTEN QUESTION
ASKED BY
20 ONE PARTY OF ANOTHER, WHO MUST ANSWER IT
UNDER
21 OATH IN WRITING. YOU MUST CONSIDER
22 INTERROGATORIES AND THE ANSWERS THERETO
JUST AS
23 IF THE QUESTIONS HAD BEEN ASKED AND
ANSWERED HERE
24 IN COURT.
25 "YOU ARE THE SOLE AND EXCLUSIVE JUDGES OF
THE
26 BELIEVABILITY OF THE WITNESSES AND THE
WEIGHT TO
27 BE GIVEN THE TESTIMONY OF EACH WITNESS.
28 IN DETERMINING THE BELIEVABILITY OF A
WITNESS YOU
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1 MAY CONSIDER ANY MATTER THAT HAS A TENDENCY
IN
2 REASON TO PROVE OR DISPROVE THE
TRUTHFULNESS OF
3 THE TESTIMONY OF THE WITNESS, INCLUDING BUT
NOT
4 LIMITED TO THE FOLLOWING:

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THE DEMEANOR AND MANNER OF THE WITNESS WHILE
TESTIFYING;
THE CHARACTER AND QUALITY OF THAT TESTIMONY;
THE EXTENT OF THE CAPACITY OF THE WITNESS TO
PERCEIVE, TO RECOLLECT, OR TO COMMUNICATE ANY
MATTER ABOUT WHICH THE WITNESS TESTIFIED;
THE OPPORTUNITY OF THE WITNESS TO PERCEIVE ANY
MATTER ABOUT WHICH THE WITNESS HAS TESTIFIED;.
THE EXISTENCE OR NONEXISTENCE OF A BIAS,
INTEREST, OR OTHER MOTIVE;
A STATEMENT PREVIOUSLY MADE BY THE WITNESS THAT.
IS CONSISTENT OR INCONSISTENT WITH THE TESTIMONY
OF THE WITNESS;
THE EXISTENCE OR NONEXISTENCE OF ANY FACT
TESTIFIED TO BY THE WITNESS;
THE ATTITUDE OF THE WITNESS TOWARD THIS ACTION OR
TOWARD THE GIVING OF TESTIMONY.
"DISCREPANCIES IN A WITNESS' TESTIMONY OR BETWEEN
SUCH WITNESS' TESTIMONY AND THAT OF OTHER
WITNESSES, IF THERE WERE ANY, DO NOT NECESSARILY
MEAN THAT ANY SUCH WITNESS SHOULD BE
DISCREDITED. FAILURE OF RECOLLECTION IS COMMON.
INNOCENT MISRECOLLECTION IS NOT UNCOMMON. TWO
PERSONS WITNESSING AN INCIDENT OR A TRANSACTION
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OFTEN WILL SEE OR HEAR IT DIFFERENTLY. WHETHER A
DISCREPANCY PERTAINS TO AN IMPORTANT MATTER OR
ONLY TO SOMETHING TRIVIAL SHOULD BE CONSIDERED BY
YOU.
"WITNESSES WHO HAVE SPECIAL KNOWLEDGE, SKILL,
EXPERIENCE, TRAINING OR EDUCATION IN A PARTICULAR
SUBJECT HAVE TESTIFIED TO CERTAIN OPINIONS.
ANY
SUCH WITNESS IS REFERRED TO AS AN EXPERT
WITNESS. IN DETERMINING WHAT WEIGHT TO GIVE ANY
SUCH OPINION, YOU SHOULD CONSIDER THE
QUALIFICATIONS AND BELIEVABILITY OF THE WITNESS,
THE FACTS OR MATERIALS UPON WHICH EACH OPINION IS
BASED, AND THE REASONS FOR EACH OPINION.
AN OPINION IS ONLY AS GOOD AS THE FACTS AND
REASONS ON WHICH IT IS BASED. IF YOU FIND

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THAT
16 ANY SUCH FACT HAS NOT BEEN PROVED, OR HAS
BEEN
17 DISPROVED, YOU MUST CONSIDER THAT IN
DETERMINING
18 THE VALUE OF THE OPINION. LIKEWISE, YOU
MUST
19 CONSIDER THE STRENGTHS AND WEAKNESSES OF
THE
20 REASONS ON WHICH IT IS BASED.
21 YOU ARE NOT BOUND BY AN OPINION. GIVE EACH
22 OPINION THE WEIGHT YOU FIND IT DESERVES.
23 HOWEVER, YOU MAY NOT ARBITRARILY OR
UNREASONABLY
24 DISREGARD THE EXPERT OPINION TESTIMONY IN
THIS
25 CASE.
26 "IN RESOLVING THE CONFLICT IN THE TESTIMONY
OF
27 EXPERT WITNESSES, YOU SHOULD WEIGH THE
OPINION OF
28 ONE EXPERT AGAINST THAT OF ANOTHER. IN
DOING
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1 THIS, YOU SHOULD CONSIDER THE
QUALIFICATIONS AND
2 BELIEVABILITY OF EACH WITNESS, THE REASONS
FOR
3 EACH OPINION AND THE MATTER UPON WHICH IT
IS
4 BASED.
5 "A HYPOTHETICAL QUESTION IS A QUESTION IN
WHICH
6 AN EXPERT WITNESS IS ASKED TO ASSUME THAT
CERTAIN
7 FACTS ARE TRUE AND TO GIVE AN OPINION BASED
UPON
8 THAT ASSUMPTION. IF ANY FACT ASSUMED IN
SUCH A
9 QUESTION HAS NOT BEEN ESTABLISHED BY THE
10 EVIDENCE, YOU SHOULD DETERMINE THE EFFECT
OF THAT
11 OMISSION UPON THE VALUE OF AN OPINION BASED
ON
12 THAT FACT.
13 "EVIDENCE HAS BEEN RECEIVED THAT PLAINTIFF
LESLIE
14 WHITELEY MADE STATEMENTS TO PHYSICIANS FOR
THE
15 PURPOSE OF DIAGNOSIS OR TREATMENT. THAT
EVIDENCE
16 MAY NOT BE CONSIDERED AS PROOF OF THE TRUTH
OF
17 THE FACTS STATED; YOU MAY CONSIDER IT ONLY
TO THE
18 EXTENT IT DOES SHOW THE INFORMATION UPON
WHICH
19 THE PHYSICIANS' OPINIONS ARE BASED.
20 HOWEVER, YOU MAY CONSIDER PLAINTIFF LESLIE
21 WHITELEY'S STATEMENTS ABOUT HER EXISTING
STATE OF
22 MIND, EMOTION, OR PHYSICAL SENSATION AND
ANY

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STATEMENTS MADE CONSTITUTING AN ADMISSION OF FACT
ADVERSE TO HER INTEREST AS PROOF OF THE TRUTH OF
THE MATTER SO STATED.
PLAINTIFFS ARE SEEKING DAMAGES BASED UPON CLAIMS
OF DEFECTIVE PRODUCTS, NEGLIGENCE, FRAUD AND
CONSPIRACY TO DEFRAUD.

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PLAINTIFFS HAVE THE BURDEN OF PROVING BY A
PREPONDERANCE OF THE EVIDENCE ALL OF THE FACTS
NECESSARY TO ESTABLISH THE ESSENTIAL ELEMENTS OF
EACH SEPARATE CLAIM.
THE ESSENTIAL ELEMENTS OF EACH SEPARATE CLAIM ARE
SET FORTH ELSEWHERE IN THESE INSTRUCTIONS.
IN
ADDITION TO THESE ESSENTIAL ELEMENTS, PLAINTIFFS
HAVE THE BURDEN OF PROVING BY A PREPONDERANCE OF
THE EVIDENCE ALL OF THE FACTS NECESSARY TO
ESTABLISH THE NATURE AND EXTENT OF THE INJURIES
AND DAMAGES CLAIMED TO HAVE BEEN SUFFERED, THE
ELEMENTS OF PLAINTIFFS' DAMAGES, AND THE AMOUNT
THEREOF.
'PREPONDERANCE OF THE EVIDENCE' MEANS EVIDENCE
THAT HAS MORE CONVINCING FORCE THAN THAT OPPOSED
TO IT. IF THE EVIDENCE IS SO EVENLY BALANCED
THAT YOU ARE UNABLE TO SAY THAT THE EVIDENCE ON
EITHER SIDE OF AN ISSUE PREPONDERATES, YOUR
FINDING ON THAT ISSUE MUST BE AGAINST THE PARTY
WHO HAD THE BURDEN OF PROVING IT.
YOU SHOULD CONSIDER ALL OF THE EVIDENCE BEARING
UPON EVERY ISSUE REGARDLESS OF WHO PRODUCED IT.
"IN THIS CASE, PLAINTIFFS SEEK TO ESTABLISH
LIABILITY ON THE PART OF DEFENDANTS PHILIP
MORRIS" --
MR. ESCHER: "AND."
THE COURT: "AND." THERE'S A TYPO HERE.
MS. CHABER: YES.

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THE COURT: LET ME START THAT ONE OVER.
"IN THIS CASE, PLAINTIFFS SEEK TO ESTABLISH
LIABILITY ON THE PART OF THE DEFENDANTS PHILIP
MORRIS AND R.J. REYNOLDS ON DIFFERENT BASES OF
RECOVERY. THE CLAIMS WHICH ARE MADE

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AGAINST THE
TOBACCO COMPANY DEFENDANTS ARE AS FOLLOWS:
1. FOR NEGLIGENT FAILURE TO WARN PRIOR TO JULY
1, 1969;
2. FOR NEGLIGENCE IN DESIGN;
3. FOR FRAUD BY INTENTIONAL MISREPRESENTATION;
4. FOR CONCEALMENT PRIOR TO JULY 1, 1969;
5. FOR FRAUD BY FALSE PROMISE;
6. FOR FRAUD BY NEGLIGENT MISREPRESENTATION;
7. FOR CONSPIRACY TO MISREPRESENT FACTS BOTH
BEFORE AND AFTER JULY 1, 1969; AND
8. FOR CONSPIRACY TO CONCEAL FACTS PRIOR TO JULY
1, 1969.
"I SHALL NOW INSTRUCT YOU ON THE LAW AS IT
APPLIES TO PLAINTIFFS' CLAIMS AGAINST THE TOBACCO
COMPANY DEFENDANTS, STARTING WITH THE CLAIM OF
NEGLIGENT FAILURE TO WARN PRIOR TO JULY 1,
1969. AS USED IN THESE INSTRUCTIONS CONCERNING
PLAINTIFFS' CLAIMS AGAINST THE TOBACCO COMPANY
DEFENDANTS, THE WORD 'DEFENDANTS' MEANS PHILIP
MORRIS AND R.J. REYNOLDS.
"THE PLAINTIFFS SEEK TO RECOVER DAMAGES AGAINST
THE TOBACCO COMPANY DEFENDANTS BASED ON A CLAIM
OF NEGLIGENT FAILURE TO WARN PRIOR TO JULY 1,

1969. THE LAW PROVIDES THAT ONE WHO SUPPLIES A
PRODUCT DIRECTLY OR THROUGH A THIRD PERSON FOR
ANOTHER TO USE, WHICH THE SUPPLIER KNOWS OR HAS
REASON TO KNOW IS DANGEROUS OR IS LIKELY TO BE
DANGEROUS FOR THE USE FOR WHICH IT IS SUPPLIED,
HAS A DUTY TO USE REASONABLE CARE TO GIVE WARNING
OF THE DANGEROUS CONDITION OF THE PRODUCT OR OF
THE FACTS WHICH MAKE IT LIKELY TO BE DANGEROUS TO
THOSE WHOM THE SUPPLIER SHOULD EXPECT TO USE THE
PRODUCT OR BE ENDANGERED BY ITS PROBABLE USE, IF
THE SUPPLIER HAS REASON TO BELIEVE THAT THEY WILL
NOT REALIZE ITS DANGEROUS CONDITION. A FAILURE
TO FULFILL THAT DUTY IS NEGLIGENCE.

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A PRODUCT IS DEFECTIVE IF THE MANUFACTURER OF A PRODUCT HAS A DUTY TO WARN OF DANGER, AND FAILS TO PROVIDE AN ADEQUATE WARNING OF THAT DANGER.

A MANUFACTURER HAS A DUTY TO WARN IF:

1. THE USE OF THE PRODUCT IN A MANNER THAT IS REASONABLY FORESEEABLE BY THE MANUFACTURER INVOLVES A SUBSTANTIAL DANGER THAT WOULD NOT BE READILY RECOGNIZED BY THE ORDINARY USER OF THE PRODUCT; AND.

2. THIS DANGER WAS KNOWN OR KNOWABLE IN LIGHT OF THE GENERALLY RECOGNIZED AND PREVAILING BEST SCIENTIFIC AND MEDICAL KNOWLEDGE AVAILABLE AT THE TIME OF THE MANUFACTURE AND DISTRIBUTION.

"ONE WHO SUPPLIES A PRODUCT DIRECTLY OR THROUGH A THIRD PERSON, FOR ANOTHER TO USE, WHICH THE

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SUPPLIER KNOWS OR HAS REASON TO KNOW IS DANGEROUS OR IS LIKELY TO BE DANGEROUS FOR THE USE FOR WHICH IT IS SUPPLIED, HAS A DUTY TO USE REASONABLE CARE TO GIVE WARNING OF THE DANGEROUS CONDITION OF THE PRODUCT OR OF FACTS WHICH MAKE IT LIKELY TO BE DANGEROUS TO THOSE WHOM THE SUPPLIER SHOULD EXPECT TO USE THE PRODUCT OR BE ENDANGERED BY ITS PROBABLE USE, IF THE SUPPLIER HAS REASON TO BELIEVE THAT THEY WILL NOT REALIZE ITS DANGEROUS CONDITION. A FAILURE TO FULFILL THAT DUTY BEFORE JULY 1, 1969 IS NEGLIGENCE.

THIS RULE APPLIES TO A MANUFACTURER OF A PRODUCT.

"THE ESSENTIAL ELEMENTS WHICH PLAINTIFFS MUST PROVE TO SUPPORT THEIR CLAIM BASED UPON AN ALLEGED NEGLIGENT FAILURE TO WARN PRIOR TO JULY 1, 1969, ARE:

1. THAT DEFENDANTS' PRODUCTS, WHEN USED IN A MANNER THAT WAS REASONABLY FORESEEABLE BY THE DEFENDANTS, INVOLVED A SUBSTANTIAL DANGER THAT WOULD NOT HAVE BEEN READILY RECOGNIZED BY THE ORDINARY USER OF THE PRODUCT;

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2. THE DANGER WAS KNOWN OR KNOWABLE IN LIGHT OF THE GENERALLY RECOGNIZED AND BEST SCIENTIFIC AND MEDICAL KNOWLEDGE AVAILABLE AT THE TIME OF MANUFACTURE AND DISTRIBUTION;

3. THE DEFENDANTS FAILED TO PROVIDE AN ADEQUATE WARNING PRIOR TO JULY 1, 1969 OF THE DANGER OF

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THEIR PRODUCTS; AND

4. THE FAILURE TO PROVIDE AN ADEQUATE WARNING PRIOR TO JULY 1, 1969 WAS A CAUSE OF INJURY AND DAMAGES TO LESLIE WHITELEY.

"PLAINTIFFS ALSO SEEK TO RECOVER DAMAGES BASED UPON A CLAIM OF NEGLIGENCE BY THE TOBACCO COMPANY DEFENDANTS AS MANUFACTURERS OF PRODUCTS. I WILL NOW INSTRUCT YOU ON THAT CLAIM.

"THE ESSENTIAL ELEMENTS OF SUCH A CLAIM ARE:

1. THE DEFENDANTS WERE NEGLIGENT IN THE DESIGN OF THEIR PRODUCTS; AND

2. THE NEGLIGENCE OF THE DEFENDANTS WAS A CAUSE OF INJURY AND DAMAGE TO LESLIE WHITELEY.

"THE MANUFACTURER OF A PRODUCT THAT IS REASONABLY CERTAIN TO BE DANGEROUS IF NEGLIGENTLY MADE, HAS A DUTY TO EXERCISE REASONABLE CARE IN THE DESIGN OF THE PRODUCT SO THAT THE PRODUCT MAY BE SAFELY USED IN A MANNER AND FOR A PURPOSE FOR WHICH IT WAS MADE. A FAILURE TO FULFILL THAT DUTY IS NEGLIGENCE.

"NEGLIGENCE IS THE DOING OF SOMETHING WHICH A REASONABLY PRUDENT PERSON WOULD NOT DO, OR THE FAILURE TO DO SOMETHING WHICH A REASONABLY PRUDENT PERSON WOULD DO, UNDER CIRCUMSTANCES SIMILAR TO THOSE SHOWN BY THE EVIDENCE. IT IS THE FAILURE TO USE ORDINARY OR REASONABLE CARE.

ORDINARY OR REASONABLE CARE IS THAT CARE WHICH

5361

PERSONS OF ORDINARY PRUDENCE WOULD USE IN ORDER TO AVOID INJURY TO THEMSELVES OR OTHERS UNDER

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CIRCUMSTANCES SIMILAR TO THOSE SHOWN BY THE EVIDENCE.

YOU WILL NOTE THAT THE PERSON WHOSE CONDUCT WE SET UP AS A STANDARD IS NOT THE EXTRAORDINARILY CAUTIOUS INDIVIDUAL, NOR THE EXCEPTIONAL SKILLFUL ONE, BUT A PERSON OF REASONABLE AND ORDINARY PRUDENCE.

"ONE TEST THAT IS HELPFUL IN DETERMINING WHETHER OR NOT A PERSON WAS NEGLIGENT IS TO ASK AND ANSWER THE QUESTION WHETHER OR NOT, IF A PERSON OF ORDINARY PRUDENCE HAD BEEN IN THE SAME SITUATION AND POSSESSED OF THE SAME KNOWLEDGE, HE OR SHE WOULD HAVE FORESEEN OR ANTICIPATED THAT SOMEONE MIGHT HAVE BEEN INJURED BY OR AS A RESULT OF HIS OR HER ACTION OR INACTION. IF THE ANSWER TO THAT IS 'YES,' AND IF THE ACTION OR INACTION REASONABLY COULD HAVE BEEN AVOIDED, THEN NOT TO AVOID IT WOULD BE NEGLIGENCE.

"THE AMOUNT OF CAUTION REQUIRED OF A PERSON IN THE EXERCISE OF ORDINARY CARE DEPENDS UPON THE CONDITIONS THAT ARE APPARENT OR THAT SHOULD BE APPARENT TO A REASONABLY PRUDENT PERSON UNDER CIRCUMSTANCES SIMILAR TO THOSE SHOWN BY THE EVIDENCE.

"EVIDENCE AS TO WHETHER A PERSON CONFORMED OR DID NOT CONFORM TO A CUSTOM THAT HAD GROWN UP IN

5362

A GIVEN LOCALITY OR BUSINESS IS RELEVANT AND OUGHT TO BE CONSIDERED, BUT IS NOT NECESSARILY CONTROLLING ON THE ISSUE WHETHER SUCH PERSON WAS NEGLIGENT. THAT ISSUE MUST BE DETERMINED BY THE STANDARD OF CARE THAT I HAVE STATED TO YOU.

"EVERY PERSON WHO IS EXERCISING ORDINARY CARE, HAS A RIGHT TO ASSUME THAT EVERY OTHER PERSON WILL PERFORM HER DUTY AND OBEYED THE LAW, AND IN THE ABSENCE OF REASONABLE CAUSE FOR THINKING OTHERWISE, IT IS NOT NEGLIGENCE FOR SUCH A

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PERSON
11 TO FAIL TO ANTICIPATE AN ACCIDENT WHICH CAN
OCCUR
12 ONLY AS A RESULT OF A VIOLATION OF LAW OR
DUTY BY
13 ANOTHER PERSON. IF A MINOR'S CONDUCT IS IN
14 QUESTION, ONE MAY ASSUME ONLY THAT A MINOR
WILL
15 ACT AS OTHER MINORS OF THE SAME AGE UNDER
SIMILAR
16 CIRCUMSTANCES ORDINARILY ACT.
17 "A PERSON WHO IS EXERCISING ORDINARY CARE
HAS A
18 RIGHT TO ASSUME THAT OTHER PERSONS ARE
ORDINARILY
19 INTELLIGENT AND POSSESSED OF NORMAL SIGHT
AND
20 HEARING, IN THE ABSENCE OF REASONABLE CAUSE
FOR
21 THINKING OTHERWISE.
22 "THE PLAINTIFFS ALSO SEEK TO RECOVER
DAMAGES
23 AGAINST THE TOBACCO COMPANY DEFENDANTS
BASED UPON
24 A CLAIM OF FRAUD. I WILL NOW INSTRUCT YOU
ON
25 THAT CLAIM.
26 CONDUCT MAY BE FRAUDULENT BECAUSE OF AN
27 INTENTIONAL MISREPRESENTATION, CONCEALMENT,
A
28 FALSE PROMISE OR A NEGLIGENT
MISREPRESENTATION.
5363
1 "THE ESSENTIAL ELEMENTS OF A CLAIM OF FRAUD
BY AN
2 INTENTIONAL REPRESENTATION ARE:
3 1. THE DEFENDANTS MUST HAVE MADE A
4 REPRESENTATION AS TO A PAST OR EXISTING
MATERIAL
5 FACT OR, WHILE UNDER NO DUTY TO SPEAK,
6 NEVERTHELESS DID SO, BUT DID NOT SPEAK
HONESTLY
7 OR MADE A MISLEADING STATEMENT OR
SUPPRESSED A
8 FACT WHICH MATERIALLY QUALIFIED THAT
STATED,
9 EITHER OF WHICH CONSTITUTES A
REPRESENTATION;
10 2. THE REPRESENTATION MUST HAVE BEEN
FALSE, OR
11 MISLEADING IN THE WAY I JUST DESCRIBED;
12 3. THE DEFENDANTS MUST HAVE KNOWN THAT THE
13 REPRESENTATION WAS FALSE, OR MISLEADING IN
THE
14 WAY I JUST DESCRIBED, WHEN MADE OR MUST
HAVE MADE
15 THE REPRESENTATION RECKLESSLY WITHOUT
KNOWING
16 WHETHER IT WAS TRUE OR FALSE;
17 4. THE DEFENDANTS MUST HAVE MADE THE
18 REPRESENTATION WITH AN INTENT TO DEFRAUD
LESLIE
19 WHITELEY, THAT IS, DEFENDANTS MUST HAVE

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MADE THE
20 REPRESENTATION FOR THE PURPOSE OF INDUCING
LESLIE
21 WHITELEY TO RELY UPON IT AND TO ACT OR TO
REFRAIN
22 FROM ACTING IN RELIANCE THEREON;
23 5. LESLIE WHITELEY MUST HAVE BEEN UNAWARE
OF THE
24 FALSITY OR MISLEADING NATURE OF THE
25 REPRESENTATION;
26 6. LESLIE WHITELEY MUST HAVE ACTED IN
RELIANCE
27 UPON THE TRUTH OF THE REPRESENTATION OR THE
28 NONMISLEADING NATURE OF THE REPRESENTATION;
5364
1 7. LESLIE WHITELEY MUST HAVE BEEN
JUSTIFIED IN
2 HER RELIANCE;
3 8. AND, FINALLY, AS A RESULT OF HER
RELIANCE,
4 LESLIE WHITELEY MUST HAVE SUSTAINED DAMAGE.
5 "ORDINARILY, EXPRESSIONS OF OPINION ARE NOT
6 TREATED AS REPRESENTATIONS OF FACT UPON
WHICH TO
7 BASE ACTIONABLE FRAUD.
8 HOWEVER, WHEN ONE PARTY POSSESSES OR HOLDS
ITSELF
9 OUT OF POSSESSING SUPERIOR KNOWLEDGE OR
SPECIAL
10 INFORMATION REGARDING THE SUBJECT OF A
11 REPRESENTATION, AND THE OTHER PARTY IS SO
12 SITUATED THAT SHE MAY REASONABLY RELY UPON
SUCH
13 SUPPOSED SUPERIOR KNOWLEDGE OR SPECIAL
14 INFORMATION, A REPRESENTATION MADE BY THE
PARTY
15 POSSESSING OR HOLDING ITSELF OUT AS
POSSESSING
16 SUCH KNOWLEDGE OR INFORMATION WILL BE
TREATED AS
17 A REPRESENTATION OF FACT ALTHOUGH IF MADE
BY ANY
18 OTHER PERSON IT MIGHT BE REGARDED AS AN
19 EXPRESSION OF OPINION.
20 WHEN A PARTY STATES AN OPINION AS A FACT,
IN SUCH
21 A MANNER THAT IT IS REASONABLE TO RELY AND
ACT
22 UPON IT AS A FACT, IT MAY BE TREATED AS A
23 REPRESENTATION OF FACT.
24 "THE PLAINTIFFS ALSO SEEK TO RECOVER
DAMAGES
25 AGAINST THE TOBACCO COMPANY DEFENDANTS
BASED UPON
26 A CLAIM FOR FRAUDULENT CONCEALMENT PRIOR TO
JULY
27 1, 1969. THE ESSENTIAL ELEMENTS OF A CLAIM
FOR
28 FRAUDULENT CONCEALMENT PRIOR TO JULY 1,
1969
5365
1 ARE:
2 1. THE DEFENDANTS MUST HAVE CONCEALED OR

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SUPPRESSED A MATERIAL FACT PRIOR TO JULY 1, 1969;
2. THE DEFENDANTS, PRIOR TO JULY 1, 1969, KNEW A
MATERIAL FACT AND ALSO KNEW THAT SUCH FACT WAS
NEITHER KNOWN NOR READILY ACCESSIBLE TO LESLIE
WHITELEY;
3. THE DEFENDANTS MUST HAVE INTENTIONALLY
CONCEALED OR SUPPRESSED THE FACT WITH THE INTENT
TO DEFRAUD LESLIE WHITELEY;
4. LESLIE WHITELEY MUST HAVE BEEN UNAWARE OF THE
FACT AND WOULD NOT HAVE ACTED AS SHE DID IF SHE
HAD KNOWN OF THE CONCEALED OR SUPPRESSED FACT;
5. AND, FINALLY, THE CONCEALMENT OR SUPPRESSION
OF THE FACT CAUSED LESLIE WHITELEY TO SUSTAIN
DAMAGE.
WHERE A MATERIAL FACT IS KNOWN TO ONE PARTY AND
NOT TO THE OTHER, FAILURE TO DISCLOSE IT IS NOT
ACTIONABLE FRAUD UNLESS THERE IS SOME
RELATIONSHIP BETWEEN THE PARTIES WHICH GIVES RISE
TO A DUTY TO DISCLOSE SUCH KNOWN FACT.
"INTENTIONAL CONCEALMENT, PRIOR TO JULY 1, 1969,
EXISTS WHERE A PARTY:
1. KNEW OF DEFECTS IN A PRODUCT AND
INTENTIONALLY CONCEALED THEM, OR
2. WHILE UNDER NO DUTY TO SPEAK, NEVERTHELESS
DID SO, BUT DID NOT SPEAK HONESTLY OR MADE
MISLEADING STATEMENTS OR SUPPRESSED FACTS WHICH

MATERIALLY QUALIFIED THOSE STATED.
"THE ESSENTIAL ELEMENTS OF A CLAIM OF FRAUD BY A
FALSE PROMISE ARE:
1. THE DEFENDANTS MUST HAVE MADE A PROMISE AS TO
A MATERIAL MATTER AND, AT THE TIME IT WAS MADE,
THE DEFENDANTS MUST HAVE INTENDED NOT TO PERFORM
IT;
2. THE DEFENDANTS MUST HAVE MADE THE PROMISE
WITH AN INTENT TO DEFRAUD LESLIE WHITELEY, THAT
IS, THE DEFENDANTS MUST HAVE MADE THE PROMISE FOR
THE PURPOSE OF INDUCING LESLIE WHITELEY TO RELY
UPON IT AND TO ACT OR REFRAIN FROM ACTING

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IN
13 RELIANCE UPON IT;
14 3. LESLIE WHITELEY MUST HAVE BEEN UNAWARE
OF THE
15 DEFENDANTS' INTENTION NOT TO PERFORM THE
PROMISE;
16 4. LESLIE WHITELEY MUST HAVE ACTED IN
RELIANCE
17 UPON THE PROMISE;
18 5. LESLIE WHITELEY MUST HAVE BEEN
JUSTIFIED IN
19 RELYING UPON THE PROMISE MADE BY THE
DEFENDANTS;
20 6. AND, FINALLY, AS A RESULT OF RELIANCE
UPON
21 DEFENDANTS' PROMISE, LESLIE WHITELEY MUST
HAVE
22 SUSTAINED DAMAGE.
23 "YOU MAY CONSIDER THE CONDUCT OF A PARTY
MAKING A
24 PROMISE, EITHER BEFORE OR AFTER THE PROMISE
WAS
25 MADE, IN DETERMINING WHETHER THERE WAS AN
26 INTENTION NOT TO PERFORM THE PROMISE WHEN
MADE.
27 "THE ESSENTIAL ELEMENTS OF A CLAIM OF FRAUD
BY A
28 NEGLIGENT MISREPRESENTATION ARE:
5367
1 1. THE DEFENDANTS MUST HAVE MADE A
2 REPRESENTATION AS TO A PAST OR EXISTING
MATERIAL
3 FACT;
4 2. THE REPRESENTATION MUST HAVE BEEN
UNTRUE;
5 3. REGARDLESS OF THEIR ACTUAL BELIEF, THE
6 DEFENDANTS MUST HAVE MADE THE
REPRESENTATION
7 WITHOUT ANY REASONABLE GROUND FOR BELIEVING
IT TO
8 BE TRUE;
9 4. THE REPRESENTATION MUST HAVE BEEN MADE
WITH
10 THE INTENT TO INDUCE LESLIE WHITELEY TO
RELY UPON
11 IT;
12 5. LESLIE WHITELEY MUST HAVE BEEN UNAWARE
OF THE
13 FALSITY OF THE REPRESENTATION;
14 6. LESLIE WHITELEY MUST HAVE ACTED IN
RELIANCE
15 UPON THE TRUTH OF THE REPRESENTATION;
16 7. LESLIE WHITELEY MUST HAVE BEEN
JUSTIFIED IN
17 RELYING UPON THE REPRESENTATION;
18 8. AND, FINALLY, AS A RESULT OF RELIANCE
UPON
19 THE TRUTH OF THE REPRESENTATION, LESLIE
WHITELEY
20 MUST HAVE SUSTAINED DAMAGE.
21 "A MISREPRESENTATION OR FALSE PROMISE OR
22 CONCEALMENT MUST HAVE BEEN MADE WITH THE
INTENT

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23 TO INDUCE SOME PERSON OR PERSONS TO ACT IN
24 RELIANCE UPON IT AND THE PARTY MAKING THE
25 REPRESENTATION OR PROMISE OR CONCEALING IS LIABLE
26 ONLY TO THOSE PERSONS TO WHOM THE REPRESENTATION
27 OR PROMISE HAS BEEN MADE OR FROM WHOM A MATERIAL
28 FACT WAS CONCEALED WITH SUCH INTENT.
5368
1 IF OTHERS BECOME AWARE OF THE REPRESENTATION OR
2 PROMISE OR ARE MISLED BY THE CONCEALMENT AND ACT
3 UPON SUCH, THERE IS NO LIABILITY.
4 ONE WHO MAKES A MISREPRESENTATION OR FALSE
5 PROMISE OR CONCEALS A MATERIAL FACT IS SUBJECT TO
6 LIABILITY IF HE OR SHE INTENDS THAT THE
7 MISREPRESENTATION OR FALSE PROMISE OR CONCEALMENT
8 OF A MATERIAL FACT WILL BE PASSED ON TO ANOTHER
9 PERSON AND INFLUENCE SUCH PERSON'S CONDUCT IN THE
10 TRANSACTION INVOLVED.
11 A PERSON WHO HAS REASON TO EXPECT THAT A
12 MISREPRESENTATION, FALSE PROMISE OR NONDISCLOSURE
13 OF MATERIAL FACT WILL BE PASSED ON TO ANOTHER
14 PERSON AND INFLUENCE THAT PERSON'S CONDUCT IF HE
15 OR SHE HAS INFORMATION THAT WOULD LEAD A
16 REASONABLE PERSON TO CONCLUDE THAT THERE IS A
17 LIKELIHOOD THAT IT WILL REACH SUCH PERSON AND
18 WILL INFLUENCE HIS OR HER CONDUCT IN THE
19 TRANSACTION INVOLVED.
20 SUBJECT TO LIABILITY MEANS THAT THE DEFENDANT IS
21 LIABLE IF ALL OF THE OTHER ESSENTIAL ELEMENTS OF
22 THE CLAIM OF FRAUD ARE ESTABLISHED.
23 ONE WHO MAKES A MISREPRESENTATION OR FALSE
24 PROMISE OR CONCEALS A MATERIAL FACT WITH THE
25 INTENT TO DEFRAUD THE PUBLIC OR A PARTICULAR
26 CLASS OF PERSONS IS DEEMED TO HAVE INTENDED TO
27 DEFRAUD EVERY INDIVIDUAL IN THAT CATEGORY WHO IS
28 ACTUALLY MISLED THEREBY."
5369
1 DID I MISREAD A LINE A MINUTE AGO?
2 MR. HARDY: YOU MISREAD LINE 15.
3 THE COURT: I DID.
4 MR. HARDY: YOU SAID "WHO."
5 THE COURT: THAT'S WHAT I THOUGHT I DID. I NEED
6 TO REREAD A LINE TO YOU, BECAUSE I MISREAD IT BEFORE.

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IT
SAYS:
"A PERSON HAS REASON TO EXPECT THAT
MISREPRESENTATION, FALSE PROMISE OR
NONDISCLOSURE
OF MATERIAL FACT WILL BE PASSED ON TO
ANOTHER
PERSON AND INFLUENCE THAT PERSON'S CONDUCT
IF HE
OR SHE HAS INFORMATION THAT WOULD LEAD A
REASONABLE PERSON TO CONCLUDE THAT THERE IS
A
LIKELIHOOD THAT IT WILL REACH SUCH PERSON
AND
WILL INFLUENCE HIS OR HER CONDUCT IN THE
TRANSACTION INVOLVED."
"A PARTY CLAIMING TO HAVE BEEN DEFRAUDED BY
A
FALSE REPRESENTATION OR PROMISE MUST HAVE
RELIED
UPON THE REPRESENTATION OR PROMISE; THAT
IS, THE
REPRESENTATION OR PROMISE MUST HAVE BEEN A
CAUSE
OF PLAINTIFF'S CONDUCT IN ENTERING INTO THE
TRANSACTION AND WITHOUT SUCH REPRESENTATION
OR
PROMISE PLAINTIFF WOULD NOT HAVE ENTERED
INTO
SUCH TRANSACTION.
THE FRAUD, IF ANY, NEED NOT BE THE SOLE
CAUSE IF
IT APPEARS THAT RELIANCE UPON THE
REPRESENTATION
OR PROMISE SUBSTANTIALLY INFLUENCED SUCH
PARTY'S
ACTION, EVEN THOUGH OTHER INFLUENCES
OPERATED AS
5370
WELL.
"A PARTY CLAIMING TO HAVE BEEN DEFRAUDED BY
A
FALSE REPRESENTATION OR PROMISE MUST NOT
ONLY
HAVE ACTED IN RELIANCE ON IT BUT MUST HAVE
BEEN
JUSTIFIED IN SUCH RELIANCE, THAT IS, THE
SITUATION MUST HAVE BEEN SUCH AS TO MAKE IT
REASONABLE IN THE LIGHT OF THE
CIRCUMSTANCES AND
PLAINTIFF'S INTELLIGENCE, EXPERIENCE AND
KNOWLEDGE, TO ACCEPT THE REPRESENTATION OR
PROMISE WITHOUT MAKING AN INDEPENDENT
INQUIRY OR
INVESTIGATION.
"THE PLAINTIFFS ALSO SEEK TO RECOVER
DAMAGES
AGAINST THE TOBACCO COMPANY DEFENDANTS
BASED UPON
A CLAIM OF CONSPIRACY. I WILL NOW INSTRUCT
YOU
ON THAT CLAIM.
A CONSPIRACY IS AN AGREEMENT ENTERED INTO

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BETWEEN
17 TWO OR MORE PERSONS WITH THE INTENT TO
AGREE OR
18 CONSPIRE AND THE INTENT TO COMMIT A
WRONGFUL ACT
19 OR WRONGFUL ACTS. PLAINTIFFS CLAIM THAT
THE
20 TOBACCO COMPANY DEFENDANTS ENTERED INTO AN
21 AGREEMENT TO MISREPRESENT FACTS REGARDING
THE
22 HEALTH EFFECTS OF CIGARETTE SMOKING, WHICH
23 INCLUDES SPEAKING DISHONESTLY, MAKING
MISLEADING
24 STATEMENTS, AND SUPPRESSING FACTS WHICH
25 MATERIALLY QUALIFY THOSE STATED. THE CLAIM
IS
26 THAT THE ALLEGED AGREEMENT TO MISREPRESENT
FACTS
27 RELATED TO THE TIME BOTH BEFORE AND AFTER
JULY 1,
28 1969. IN ADDITION, PLAINTIFFS CLAIM THAT
THE
5371
1 TOBACCO COMPANY DEFENDANTS AGREED TO
CONCEAL
2 FACTS REGARDING THE HEALTH EFFECTS OF
CIGARETTE
3 SMOKING PRIOR TO JULY 1, 1969.
4 IN ORDER TO PREVAIL ON THEIR CLAIM OF
CONSPIRACY
5 TO MISREPRESENT FACTS, PLAINTIFFS MUST
PROVE BY A
6 PREPONDERANCE OF THE EVIDENCE EACH OF THE
7 FOLLOWING ESSENTIAL ELEMENTS:
8 1. THAT DEFENDANTS PHILIP MORRIS AND R.J.
9 REYNOLDS, TOGETHER OR WITH OTHER TOBACCO
10 COMPANIES, OR WITH OTHERS, ENTERED INTO AN
11 AGREEMENT TO MISREPRESENT A FACT REGARDING
THE
12 HEALTH EFFECTS OF CIGARETTE SMOKING AT ANY
TIME;
13 2. THAT SUCH AGREEMENT WAS ENTERED INTO
WITH THE
14 INTENT ON THE PART OF PHILIP MORRIS AND
R.J.
15 REYNOLDS, TOGETHER WITH OTHER TOBACCO
COMPANIES
16 OR WITH OTHERS" --
17 MR. HARDY: EXCUSE ME. "OR."
18 MS. CHABER: "TOGETHER OR."
19 THE COURT: EXCUSE ME. LET ME START THAT
OVER.
20 "2. THAT SUCH AGREEMENT WAS ENTERED INTO
WITH
21 THE INTENT ON THE PART OF PHILIP MORRIS AND
R.J.
22 REYNOLDS, TOGETHER OR WITH OTHER TOBACCO
23 COMPANIES, OR WITH OTHERS, TO DEFRAUD THE
PUBLIC,
24 INCLUDING LESLIE WHITELEY;.
25 3. THAT, PURSUANT TO SUCH AGREEMENT,
PHILIP
26 MORRIS AND R.J. REYNOLDS, TOGETHER OR WITH

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OTHER
27 TOBACCO COMPANIES, OR WITH OTHERS,
MISREPRESENTED
28 A FACT REGARDING THE HEALTH EFFECTS OF
CIGARETTE
5372
1 SMOKING AT ANY TIME, WITH THE INTENT TO
DEFRAUD
2 THE PUBLIC, INCLUDING LESLIE WHITELEY;.
3 4. THAT LESLIE WHITELEY WAS UNAWARE OF THE
4 MISREPRESENTED FACT AND WOULD NOT HAVE
ACTED AS
5 SHE DID IF SHE HAD KNOWN OF IT;
6 5. THAT LESLIE WHITELEY WAS JUSTIFIED IN
HER
7 RELIANCE;
8 6. AND FINALLY, THAT THE MISREPRESENTATION
OF
9 THE FACT AT ANY TIME CAUSED LESLIE WHITELEY
TO
10 SUSTAIN DAMAGE.
11 IN ORDER TO PREVAIL ON THEIR CLAIM OF
CONSPIRACY
12 TO CONCEAL FACTS, PLAINTIFFS MUST PROVE BY
A
13 PREPONDERANCE OF THE EVIDENCE EACH OF THE
14 FOLLOWING ESSENTIAL ELEMENTS:
15 1. THAT DEFENDANTS PHILIP MORRIS AND R.J.
16 REYNOLDS, TOGETHER OR WITH OTHER TOBACCO
17 COMPANIES, OR WITH OTHERS, ENTERED INTO AN
18 AGREEMENT TO CONCEAL A FACT REGARDING THE
HEALTH
19 EFFECTS OF CIGARETTE SMOKING PRIOR TO JULY
1,
20 1969;
21 2. THAT SUCH AGREEMENT WAS ENTERED INTO
WITH THE
22 INTENT ON THE PART OF PHILIP MORRIS AND
R.J.
23 REYNOLDS, TOGETHER OR WITH OTHER TOBACCO
24 COMPANIES, OR WITH OTHERS, TO DEFRAUD THE
PUBLIC,
25 INCLUDING LESLIE WHITELEY;
26 3. THAT, PURSUANT TO SUCH AGREEMENT,
PHILIP
27 MORRIS AND R.J. REYNOLDS, TOGETHER OR WITH
OTHER
28 TOBACCO COMPANIES, OR WITH OTHERS,
CONCEALED A
5373
1 FACT REGARDING THE HEALTH EFFECTS OF
CIGARETTE
2 SMOKING PRIOR TO JULY 1, 1969, WITH THE
INTENT TO
3 DEFRAUD THE PUBLIC, INCLUDING LESLIE
WHITELEY;
4 4. THAT LESLIE WHITELEY WAS UNAWARE, PRIOR
TO
5 JULY 1, 1969, OF THE CONCEALED FACT AND
WOULD NOT
6 HAVE ACTED AS SHE DID IF SHE HAD KNOWN OF
IT;
7 5. AND FINALLY, THAT THE CONCEALMENT

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BEFORE JULY
1, 1969 CAUSED LESLIE WHITELEY TO SUSTAIN
DAMAGE.
"MEMBERSHIP OR PARTICIPATION IN A
CONSPIRACY TO
COMMIT A WRONGFUL ACT IS BY ITSELF NOT A
BASIS
FOR LIABILITY. CONSPIRATORS HAVE NO
LIABILITY
UNLESS A WRONGFUL ACT IS COMMITTED BY ONE
OF MORE
OF THE CONSPIRATORS IN FURTHERANCE OF THE
CONSPIRACY CAUSING ANOTHER PARTY TO SUSTAIN
INJURY, DAMAGE, LOSS, OR HARM.
THE LIABILITY OF A DEFENDANT TO PLAINTIFFS
ON
THEIR CONSPIRACY THEORY SHALL BE DETERMINED
BY
YOU IN ACCORDANCE WITH THE FOLLOWING
INSTRUCTIONS:
"EACH MEMBER OF A CONSPIRACY IS LIABLE FOR
EACH
ACT AND BOUND BY EACH DECLARATION OF EVERY
OTHER
MEMBER OF THE CONSPIRACY IF SUCH ACT OR
SUCH
DECLARATION IS IN FURTHERANCE OF THE OBJECT
OF
THE CONSPIRACY.
THE ACT OF ONE CONSPIRATOR PURSUANT TO OR
IN
FURTHERANCE OF THE COMMON DESIGN OF THE
CONSPIRACY IS THE ACT OF ALL CONSPIRATORS.
5374
A MEMBER OF A CONSPIRACY IS NOT ONLY LIABLE
FOR
THE PARTICULAR WRONGFUL ACT THAT TO ITS
KNOWLEDGE
ITS CONFEDERATES AGREED TO AND DID COMMIT,
BUT IS
ALSO LIABLE FOR THE NATURAL AND PROBABLE
CONSEQUENCES OF ANY WRONGFUL ACT OF A
COCONSPIRATOR TO FURTHER THE OBJECT OF THE
CONSPIRACY, EVEN THOUGH SUCH ACT WAS NOT
INTENDED
AS A PART OF THE AGREED-UPON OBJECTIVE AND
EVEN
THOUGH IT WAS NOT PRESENT AT THE TIME OF
THE
COMMISSION OF SUCH ACT.
YOU MUST DETERMINE WHETHER DEFENDANTS,
PHILIP
MORRIS AND/OR R.J. REYNOLDS, WERE MEMBERS
OF A
CONSPIRACY TO COMMIT ANY ORIGINALLY
AGREED-UPON
WRONGFUL ACT OR ACTS, AND, IF SO, WHETHER
THE
ALLEGED ACT WAS PERPETRATED BY A
COCONSPIRATOR IN
FURTHERANCE OF SUCH CONSPIRACY AND WAS A
NATURAL
AND PROBABLE CONSEQUENCE OF THE AGREED-UPON

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OBJECTIVE OF SUCH CONSPIRACY.
"THE FORMATION AND EXISTENCE OF A CONSPIRACY MAY
BE INFERRED FROM ALL CIRCUMSTANCES TENDING TO
SHOW THE COMMON INTENT AND MAY BE PROVED IN THE
SAME WAY AS ANY OTHER FACT MAY BE PROVED, EITHER
BY DIRECT TESTIMONY OR BY" -- EXCUSE ME --
"EITHER BY DIRECT TESTIMONY OF THE FACT OR BY
CIRCUMSTANTIAL EVIDENCE, OR BY BOTH DIRECT AND
CIRCUMSTANTIAL EVIDENCE. IT IS NOT NECESSARY TO
SHOW A MEETING OF THE ALLEGED CONSPIRATORS OR THE
MAKING OF AN EXPRESS OR FORMAL AGREEMENT.
5375
"EVIDENCE THAT A CORPORATION WAS ASSOCIATED WITH
ONE OR MORE OTHER CORPORATIONS ALLEGED OR PROVED
TO HAVE BEEN MEMBERS OF A CONSPIRACY IS NOT, IN
ITSELF, SUFFICIENT TO PROVE THAT SUCH CORPORATION
WAS A MEMBER OF THE ALLEGED CONSPIRACY.
"IT IS NOT A DEFENSE THAT AN ALLEGED CONSPIRATOR
DID NOT KNOW ALL THE OTHER CONSPIRATORS. THE
MEMBERS OF A CONSPIRACY MAY BE WIDELY SEPARATED
GEOGRAPHICALLY, AND YET MAY BE IN AGREEMENT ON A
WRONGFUL DESIGN AND MAY ACT IN CONCERT IN PURSUIT
OF THAT DESIGN. THE ADOPTION BY A PERSON OF THE
WRONGFUL DESIGN ENTERTAINED IN COMMON BY OTHERS
AND OF ITS OBJECT AND PURPOSES IS ALL THAT IS
NECESSARY TO MAKE THAT PERSON A COCONSPIRATOR
WHEN THE REQUIRED ELEMENTS OF A CONSPIRACY ARE
PRESENT.
"WHERE A CONSPIRATOR COMMITS AN ACT WHICH IS
NEITHER IN FURTHERANCE OF THE OBJECT OF THE
CONSPIRACY NOR THE NATURAL AND PROBABLE
CONSEQUENCE OF AN ATTEMPT TO ATTAIN THAT OBJECT,
IT ALONE IS RESPONSIBLE FOR AND IS BOUND BY THAT
ACT, AND NO RESPONSIBILITY THEREFOR ATTACHES TO
ANY OF ITS CONFEDERATES.
"THE ACT OR DECLARATION OF A PERSON WHO IS NOT A

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MEMBER OF A CONSPIRACY IS NOT BINDING UPON THE MEMBERS OF THE CONSPIRACY, EVEN IF THE ACT OR DECLARATION TENDED TO PROMOTE THE OBJECT OF THE CONSPIRACY.

5376

"EVIDENCE OF THE COMMISSION OF AN ACT WHICH FURTHERED THE PURPOSE OF AN ALLEGED CONSPIRACY IS NOT, IN ITSELF, SUFFICIENT TO PROVE THAT THE COMPANY COMMITTING THE ACT WAS A MEMBER OF SUCH A CONSPIRACY.

"EVERY PERSON, WHO JOINS A CONSPIRACY AFTER ITS FORMATION, IS LIABLE FOR AND BOUND BY THE ACTS DONE AND DECLARATIONS MADE BY OTHER MEMBERS IN PURSUANCE AND FURTHERANCE OF THE CONSPIRACY, BEFORE AND DURING THE TIME THAT IT IS A MEMBER OF THE CONSPIRACY.

EVIDENCE OF ANY ACTS DONE OR DECLARATIONS MADE BY OTHER CONSPIRATORS PRIOR TO THE TIME SUCH PERSON BECOMES A MEMBER OF THE CONSPIRACY ALSO MAY BE CONSIDERED BY YOU IN DETERMINING THE NATURE, OBJECTIVES AND PURPOSES OF THE CONSPIRACY.

"NO ACT OR DECLARATION OF A CONSPIRATOR COMMITTED OR MADE AFTER THE CONSPIRACY HAS BEEN TERMINATED IS BINDING UPON COCONSPIRATORS, AND THEY ARE NOT LIABLE FOR ANY SUCH ACT.

"EACH TOBACCO COMPANY DEFENDANT IN THIS CASE IS INDIVIDUALLY ENTITLED TO, AND MUST RECEIVE, YOUR DETERMINATION WHETHER IT WAS A MEMBER OF THE ALLEGED CONSPIRACY. AS TO EACH SUCH DEFENDANT YOU MUST DETERMINE WHETHER IT WAS A CONSPIRATOR BY DECIDING WHETHER IT WILLFULLY, INTENTIONALLY AND KNOWINGLY JOINED WITH ANY OTHER OR OTHERS IN THE ALLEGED CONSPIRACY.

5377

"EVIDENCE OF A STATEMENT MADE BY ONE ALLEGED CONSPIRATOR SHALL NOT BE CONSIDERED BY YOU AS

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AGAINST ANOTHER ALLEGED CONSPIRATOR UNLESS YOU FIND BY A PREPONDERANCE OF THE EVIDENCE THAT:

1. OTHER EVIDENCE INDEPENDENT OF THE STATEMENT HAS ESTABLISHED THE EXISTENCE OF A CONSPIRACY TO COMMIT A WRONGFUL ACT AT THE TIME SUCH STATEMENT WAS MADE;

2. THE STATEMENT WAS MADE WHILE THE PERSON MAKING THE STATEMENT WAS PARTICIPATING IN THE CONSPIRACY AND THAT THE PERSON AGAINST WHOM IT WAS OFFERED WAS PARTICIPATING IN THE CONSPIRACY BEFORE OR DURING THAT TIME; AND

3. SUCH STATEMENT WAS MADE IN FURTHERANCE OF THE OBJECTIVE OF THE CONSPIRACY.

"THE WORD 'STATEMENT,' AS USED IN THIS INSTRUCTION, INCLUDES ANY ORAL OR WRITTEN VERBAL EXPRESSION OR THE NONVERBAL CONDUCT OF A PERSON INTENDED BY THAT PERSON AS A SUBSTITUTE FOR ORAL OR WRITTEN VERBAL EXPRESSION.

"UNDER THE LAW, A CORPORATION, INCLUDING ALL OF ITS EMPLOYEES, IS A SINGLE PERSON. SINCE A CONSPIRACY REQUIRES AN AGREEMENT ENTERED INTO BETWEEN TWO OR MORE PERSONS, A CORPORATION CANNOT BE FOUND TO HAVE CONSPIRED WITH ITSELF OR WITH ITS OWN EMPLOYEES. IT CAN ONLY CONSPIRE WITH SOMEONE ELSE, INCLUDING ANOTHER CORPORATION.

"REGARDLESS OF ANY OF THE OTHER RULES OF LAW SET FORTH IN THESE INSTRUCTIONS, YOU MUST FOLLOW THE

RULES OF FEDERAL LAW WHICH I SHALL NOW GIVE TO YOU.

BECAUSE OF FEDERAL LAW, YOU MAY NOT BASE ANY FINDING OF LIABILITY ON A DETERMINATION THAT AFTER JULY 1, 1969, THE TOBACCO COMPANY DEFENDANTS SHOULD HAVE INCLUDED ADDITIONAL OR MORE CLEARLY-STATED WARNINGS ON THE PACKAGES OR IN THE ADVERTISING OR PROMOTION OF THEIR CIGARETTES.

ALSO BECAUSE OF FEDERAL LAW, AND EXCEPT ONLY AS STATED BELOW, YOU MAY NOT BASE ANY FINDING

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OF
12 LIABILITY ON THE BASIS THAT:
13 (A) DEFENDANT TOBACCO COMPANIES, THROUGH
THEIR
14 ADVERTISING OR PROMOTIONAL PRACTICES,
15 NEUTRALIZED, MINIMIZED, OR UNDERMINED THE
EFFECT
16 OF THE FEDERALLY MANDATED WARNINGS AFTER
JULY 1,
17 1969, OR
18 (B) DEFENDANT TOBACCO COMPANIES, AFTER
JULY 1,
19 1969, FAILED TO DISCLOSE, OR CONCEALED OR
20 SUPPRESSED, INFORMATION ABOUT THE HEALTH
RISKS OF
21 SMOKING, INCLUDING 'ADDICTION.'
22 THE FEDERAL LAW DOES NOT LIMIT THE
POTENTIAL
23 LIABILITY OF THE TOBACCO COMPANY DEFENDANTS
BASED
24 ON ANY OF THE CLAIMS ABOUT WHICH I HAVE
25 INSTRUCTED YOU.
26 "TURNING NEXT TO PLAINTIFFS' CLAIM AGAINST
27 DEFENDANT METALCLAD INSULATION, PLAINTIFFS
SEEK
28 TO ESTABLISH LIABILITY ON THE PART OF
METALCLAD
5379
1 BASED UPON A CLAIM OF DESIGN DEFECT
RESULTING
2 FROM THE ALLEGED FAILURE OF METALCLAD'S
PRODUCT
3 TO PERFORM AS SAFELY AS THE ORDINARY
CONSUMER
4 WOULD EXPECT.
5 "THE ESSENTIAL ELEMENTS WHICH PLAINTIFFS
MUST
6 PROVE TO SUPPORT THEIR CLAIM AGAINST
METALCLAD
7 INSULATION BASED UPON AN ALLEGED PRODUCT
DESIGN
8 DEFECT ARE:
9 1. A PRODUCT SUPPLIED BY METALCLAD
POSSESSED A
10 DEFECT IN ITS DESIGN;
11 2. THE DEFECT IN DESIGN EXISTED AT THE
TIME IT
12 LEFT METALCLAD'S POSSESSION;
13 3. THE DEFECT IN DESIGN WAS A CAUSE OF
INJURY TO
14 THE PLAINTIFF; AND
15 4. PLAINTIFF'S INJURY RESULTED FROM A USE
OF THE
16 PRODUCT THAT WAS REASONABLY FORESEEABLE BY
17 METALCLAD.
18 AN ASBESTOS PRODUCT IS DEFECTIVE IF IT
FAILS TO
19 PERFORM AS SAFELY AS AN ORDINARY CONSUMER
WOULD
20 EXPECT WHEN USED IN AN INTENDED OR
REASONABLY
21 FORESEEABLE MANNER.
22 "FOR THE PURPOSES OF DETERMINING WHETHER AN

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ASBESTOS PRODUCT PERFORMED AS SAFELY AS AN ORDINARY CONSUMER WOULD HAVE EXPECTED, THE PRODUCT MUST MEET THE SAFETY EXPECTATIONS OF THE GENERAL PUBLIC AS REPRESENTED BY THE ORDINARY CONSUMER, NOT THE INDUSTRY OR GOVERNMENTAL AGENCY.

5380

"TURNING TO ANOTHER SUBJECT, THE FOLLOWING INSTRUCTIONS APPLY TO EACH OF PLAINTIFFS' CLAIMS AGAINST EACH DEFENDANT, UNLESS OTHERWISE STATED.

"THE LAW DEFINES CAUSE IN ITS OWN PARTICULAR WAY. A CAUSE OF INJURY, DAMAGE, LOSS OR HARM IS SOMETHING THAT IS A SUBSTANTIAL FACTOR IN BRINGING ABOUT AN INJURY, DAMAGE, LOSS OR HARM.

"THERE MAY BE MORE THAN ONE CAUSE OF AN INJURY. WHEN NEGLIGENT OR WRONGFUL CONDUCT OF TWO OR MORE PERSONS OR NEGLIGENT OR WRONGFUL CONDUCT AND A DEFECTIVE PRODUCT CONTRIBUTE CONCURRENTLY AS CAUSES OF AN INJURY, THE CONDUCT OF EACH IS A CAUSE OF THE INJURY REGARDLESS OF THE EXTENT TO WHICH EACH CONTRIBUTES TO THE INJURY. A CAUSE IS CONCURRENT IF IT WAS OPERATIVE AT THE MOMENT OF INJURY AND ACTED WITH ANOTHER CAUSE TO PRODUCE THE INJURY. IT IS NO DEFENSE THAT THE NEGLIGENT OR WRONGFUL CONDUCT OF A PERSON NOT JOINED AS A PARTY WAS ALSO A CAUSE OF THE INJURY.

"IF YOU FIND THAT CIGARETTE PRODUCTS WERE A CAUSE OF PLAINTIFF LESLIE WHITELEY'S LUNG CANCER, THEN PLAINTIFFS MAY MEET THE BURDEN OF PROVING THAT EXPOSURE TO THE PRODUCTS OF PHILIP MORRIS OR R.J. REYNOLDS WAS A SUBSTANTIAL FACTOR IN CAUSING HER LUNG CANCER BY SHOWING THAT IN REASONABLE MEDICAL PROBABILITY THOSE PRODUCTS WERE A SUBSTANTIAL FACTOR CONTRIBUTING TO PLAINTIFF LESLIE WHITELEY'S RISK OF DEVELOPING LUNG CANCER.

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SIMILARLY, IF YOU FIND THAT ASBESTOS PRODUCTS

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WERE A CAUSE OF PLAINTIFF LESLIE WHITELEY'S LUNG
CANCER, THEN PLAINTIFFS MAY MEET THE BURDEN OF
PROVING THAT EXPOSURE TO THE PRODUCTS OF
METALCLAD INSULATION WAS A SUBSTANTIAL FACTOR IN
CAUSING HER LUNG CANCER BY SHOWING THAT IN
REASONABLE MEDICAL PROBABILITY THOSE PRODUCTS
WERE A SUBSTANTIAL FACTOR CONTRIBUTING TO
PLAINTIFF LESLIE WHITELEY'S RISK OF DEVELOPING
LUNG CANCER.
"THE TOTAL AMOUNT OF PLAINTIFFS' DAMAGES,
ECONOMIC AND NONECONOMIC, IS THE AMOUNT THAT WILL
REASONABLY COMPENSATE PLAINTIFFS FOR EACH OF THE
FOLLOWING ELEMENTS OF CLAIMED LOSS OR HARM,
PROVIDED THAT YOU FIND THAT SUCH LOSS OR HARM WAS
OR WILL BE SUFFERED BY PLAINTIFFS AND WAS OR WILL
BE CAUSED BY THE ACT OR OMISSION UPON WHICH YOU
BASE YOUR FINDING OF LIABILITY OF THE DEFENDANTS,
OR ANY OF THEM, IF YOU SO FIND.
THE TERM ECONOMIC DAMAGES MEANS OBJECTIVELY
VERIFIABLE MONETARY LOSSES, INCLUDING MEDICAL
EXPENSES AND THE ECONOMIC VALUE OF LOST HOUSEHOLD
SERVICES.
THE TERM NONECONOMIC DAMAGES MEANS SUBJECTIVE,
NONMONETARY LOSSES, INCLUDING BUT NOT LIMITED TO
PAIN, SUFFERING, INCONVENIENCE, MENTAL SUFFERING,
EMOTIONAL DISTRESS, AND HUMILIATION.
THE AMOUNT OF SUCH AWARD, INCLUDING ECONOMIC AND
5382
NONECONOMIC DAMAGES, SHALL INCLUDE:
"THE REASONABLE VALUE OF MEDICAL, HOSPITAL AND
NURSING AND ATTENDANT CARE, SERVICES, AND
SUPPLIES REASONABLY REQUIRED AND ACTUALLY GIVEN
IN THE TREATMENT OF PLAINTIFF LESLIE WHITELEY TO
THE PRESENT TIME AND THE PRESENT CASH VALUE OF
THE REASONABLE VALUE OF SIMILAR ITEMS REASONABLY
CERTAIN TO BE REQUIRED AND GIVEN IN THE FUTURE.
THIS IS ECONOMIC DAMAGE.
THE FACT, IF IT BE A FACT, THAT ANY OF THE
FOREGOING EXPENSES WERE PAID BY SOME SOURCE OTHER

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THAN PLAINTIFF LESLIE WHITELEY'S OWN FUNDS DOES
NOT AFFECT HER RIGHT TO RECOVER FOR SUCH EXPENSES.
"REASONABLE COMPENSATION FOR ANY PAIN, DISCOMFORT, FEARS, ANXIETY AND OTHER MENTAL AND
EMOTIONAL DISTRESS SUFFERED BY PLAINTIFF LESLIE
WHITELEY AND OF WHICH INJURY WAS A CAUSE AND FOR
SIMILAR SUFFERING REASONABLY CERTAIN TO BE EXPERIENCED IN THE FUTURE FROM THE SAME CAUSE.
NO DEFINITE STANDARD OR METHOD OF CALCULATION IS
PRESCRIBED BY LAW BY WHICH TO FIX REASONABLE
COMPENSATION FOR PAIN AND SUFFERING. NOR IS THE
OPINION OF ANY WITNESS REQUIRED AS TO THE AMOUNT
OF SUCH REASONABLE COMPENSATION. FURTHERMORE,
THE ARGUMENT OF COUNSEL AS TO THE AMOUNT OF
DAMAGES IS NOT EVIDENCE OF REASONABLE
COMPENSATION. IN MAKING AN AWARD FOR PAIN AND
5383
SUFFERING YOU SHALL EXERCISE YOUR AUTHORITY WITH
CALM AND REASONABLE JUDGMENT AND THE DAMAGES YOU
FIX SHALL BE JUST AND REASONABLE IN THE LIGHT OF
THE EVIDENCE.
THIS IS NONECONOMIC DAMAGE.
"IF YOU FIND THAT PLAINTIFF LESLIE WHITELEY IS
ENTITLED TO A VERDICT AGAINST THE DEFENDANTS, OR
ANY OF THEM, AND IF YOU FIND THAT THE ACT OR
OMISSION UPON WHICH YOU BASE YOUR FINDING OF
LIABILITY HAS CAUSED PLAINTIFF LEONARD WHITELEY
TO HAVE SUFFERED, OR THAT HE WILL BE REASONABLY
CERTAIN TO SUFFER IN THE FUTURE, ANY OF THE
FOLLOWING LOSSES:
1. ANY LOSS OF HIS WIFE'S LOVE, COMPANIONSHIP,
COMFORT, AFFECTION, SOCIETY SOLACE OR MORAL
SUPPORT;
2. ANY LOSS OF ENJOYMENT OF SEXUAL RELATIONS OR
ABILITY TO HAVE CHILDREN; OR
3. ANY LOSS OF HIS WIFE'S PHYSICAL ASSISTANCE IN
THE OPERATION AND MAINTENANCE OF THE HOME;
THEN YOU SHALL AWARD PLAINTIFF LEONARD WHITELEY

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REASONABLE COMPENSATION FOR ANY OF SUCH LOSSES AS
MAY BE ESTABLISHED BY THE EVIDENCE.
THIS IS NONECONOMIC DAMAGE.
IF YOU FIND THAT PLAINTIFF LEONARD WHITELEY IS
ENTITLED TO COMPENSATION FOR ANY LOSS OF
CONSORTIUM AS DESCRIBED ABOVE, YOU WILL NOT
INCLUDE IN ANY SUCH AWARD ANY COMPENSATION FOR

5384

LOSSES THAT PLAINTIFF LESLIE WHITELEY MAY BE
ENTITLED TO RECOVER. NEITHER WILL YOU INCLUDE IN
ANY AWARD TO PLAINTIFF LEONARD WHITELEY ANY
COMPENSATION FOR HIS PERSONAL SERVICES TO HIS
WIFE, SUCH AS NURSING, AS THAT TOO IS INCLUDED IN
PLAINTIFF LESLIE WHITELEY'S RIGHT OF RECOVERY.
"YOU ARE NOT PERMITTED TO AWARD A PARTY
SPECULATIVE DAMAGES, WHICH MEANS COMPENSATION FOR
FUTURE LOSS OR HARM WHICH, ALTHOUGH POSSIBLE, IS
CONJECTURAL OR NOT REASONABLY CERTAIN.
HOWEVER, IF YOU DETERMINE THAT A PARTY IS
ENTITLED TO RECOVER, YOU SHOULD COMPENSATE A
PARTY FOR LOSS OR HARM CAUSED BY THE INJURY IN
QUESTION WHICH IS REASONABLY CERTAIN TO BE
SUFFERED IN THE FUTURE.
"THE AMOUNT OF DAMAGES CLAIMED IN THE ARGUMENT OF
COUNSEL MUST NOT BE CONSIDERED BY YOU AS EVIDENCE
OF REASONABLE COMPENSATION.
"ACCORDING TO A TABLE OF MORTALITY, THE LIFE
EXPECTANCY OF A WHITE FEMALE PERSON AGED 40 YEARS
IS 41.2 ADDITIONAL YEARS. THIS FIGURE IS NOT
CONCLUSIVE. IT IS AN AVERAGE LIFE EXPECTANCY OF
PERSONS WHO HAVE REACHED THAT AGE. THIS FIGURE
MAY BE CONSIDERED BY YOU IN CONNECTION WITH OTHER
EVIDENCE RELATING TO THE PROBABLE LIFE EXPECTANCY
OF PLAINTIFF, INCLUDING EVIDENCE OF OCCUPATION,
HEALTH, HABITS AND OTHER ACTIVITIES, BEARING IN
MIND THAT MANY PERSONS LIVE LONGER AND MANY DIE

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SOONER THAN THE AVERAGE.
"ANY AWARD FOR FUTURE ECONOMIC LOSS MUST BE

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ONLY
 3 FOR ITS PRESENT CASH VALUE.
 4 PRESENT CASH VALUE IS THE PRESENT SUM OF
MONEY
 5 WHICH, TOGETHER WITH THE INVESTMENT RETURN
 6 THEREON, WHEN INVESTED SO AS TO YIELD THE
HIGHEST
 7 RATE OF RETURN CONSISTENT WITH REASONABLE
 8 SECURITY, WILL PAY THE EQUIVALENT OF LOST
FUTURE
 9 BENEFITS AT THE TIMES, IN THE AMOUNTS, AND
FOR
10 PERIOD THAT YOU FIND SUCH FUTURE BENEFITS
WOULD
11 HAVE BEEN RECEIVED.
12 THE PRESENT CASH VALUE WILL, OF COURSE, BE
LESS
13 THAN THE AMOUNT YOU FIND TO BE THE LOSS OF
SUCH
14 FUTURE BENEFITS.
15 "IF YOU FIND THAT DEFENDANT PHILIP MORRIS
OR
16 DEFENDANT R.J. REYNOLDS IS LIABLE TO PAY
DAMAGES
17 TO PLAINTIFF LESLIE WHITELEY UNDER THE
COURT'S
18 INSTRUCTIONS, YOU SHOULD THEN CONSIDER
WHETHER
19 THE CONDUCT OF PHILIP MORRIS OR R.J.
REYNOLDS
20 THAT GAVE RISE TO THAT LIABILITY WAS OF
SUCH A
21 CHARACTER AS TO SUBJECT PHILIP MORRIS OR
R.J.
22 REYNOLDS TO PUNITIVE DAMAGES. PHILIP
MORRIS OR
23 R.J. REYNOLDS MAY BE SUBJECTED TO PUNITIVE
24 DAMAGES IF, BUT ONLY IF, YOU FIND BY CLEAR
AND
25 CONVINCING EVIDENCE THAT SUCH COMPANY WAS
GUILTY
26 OF MALICE, FRAUD, OR OPPRESSION IN THE
CONDUCT ON
27 WHICH YOU BASE YOUR FINDING OF LIABILITY OF
THAT
28 COMPANY, IF YOU SO FIND.
5386
 1 'CLEAR AND CONVINCING' EVIDENCE MEANS
EVIDENCE
 2 OF SUCH CONVINCING FORCE THAT IT
DEMONSTRATES, IN
 3 CONTRAST TO THE OPPOSING EVIDENCE, A HIGH
 4 PROBABILITY OF THE TRUTH OF THE FACTS FOR
WHICH
 5 IT IS OFFERED AS PROOF. SUCH EVIDENCE
REQUIRES A
 6 HIGHER STANDARD OF PROOF THAN PROOF BY A
 7 PREPONDERANCE OF THE EVIDENCE.
 8 YOU SHOULD CONSIDER ALL OF THE EVIDENCE
BEARING
 9 UPON EVERY ISSUE REGARDLESS OF WHO PRODUCED
IT.
10 "THE LAW USES AND DEFINES THE WORD 'FRAUD'

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IN
MORE THAN ONE WAY DEPENDING ON THE ISSUE BEING
DETERMINED.
I HAVE PREVIOUSLY INSTRUCTED YOU AS TO THE
DEFINITION OF 'FRAUD' FOR THE PURPOSES OF
PLAINTIFFS' CLAIMS FOR COMPENSATORY DAMAGES BASED
ON CLAIMS OF FRAUD. YOU WILL NOTE THAT THE
DEFINITION OF THE WORD 'FRAUD' FOR PURPOSES OF
THOSE CLAIMS IS DIFFERENT FROM THE DEFINITION OF
THE WORD 'FRAUD' FOR THE PURPOSES OF THE CLAIMS
FOR PUNITIVE DAMAGES.
EACH DEFINITION OF 'FRAUD' SHOULD BE USED ONLY
FOR THE PURPOSES FOR WHICH ITS USE IS DEFINED BY
THE COURT. THE DETERMINATION BY YOU OF WHETHER
PLAINTIFF LESLIE WHITELEY HAS ESTABLISHED ALL
ELEMENTS OF ONE OR MORE OF HER CLAIMS OF FRAUD
FOR PURPOSES OF RECOVERING COMPENSATORY DAMAGES
DOES NOT REQUIRE THE DETERMINATION BY YOU THAT
PLAINTIFFS HAVE ESTABLISHED THAT A DEFENDANT IS
5387
GUILTY OF FRAUD FOR PURPOSES OF DETERMINING
WHETHER PLAINTIFFS MAY BE ENTITLED TO PUNITIVE
DAMAGES.
"'MALICE' MEANS CONDUCT WHICH IS INTENDED BY
THE DEFENDANT TO CAUSE INJURY TO THE PLAINTIFF OR
DESPICABLE CONDUCT WHICH IS CARRIED ON BY THE
DEFENDANT WITH A WILLFUL AND CONSCIOUS DISREGARD
FOR THE RIGHTS OR SAFETY OF OTHERS. A PERSON
ACTS WITH CONSCIOUS DISREGARD OF THE RIGHTS OR
SAFETY OF OTHERS WHEN HE OR SHE IS AWARE OF THE
PROBABLE DANGEROUS CONSEQUENCES OF HIS OR HER
CONDUCT AND WILLFULLY AND DELIBERATELY FAILS TO
AVOID THOSE CONSEQUENCES.
'DESPICABLE CONDUCT' IS CONDUCT WHICH IS SO
VILE, BASE, CONTEMPTIBLE, MISERABLE, WRETCHED, OR
LOATHSOME THAT IT WOULD BE LOOKED DOWN UPON AND
DESPISED BY ORDINARY DECENT PEOPLE.
IN THE CONTEXT OF PUNITIVE DAMAGES, 'FRAUD'

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MEANS
AN INTENTIONAL MISREPRESENTATION OR DECEIT WITH
THE INTENTION ON THE PART OF THE DEFENDANT OF
THEREBY DEPRIVING A PERSON OF PROPERTY OR LEGAL
RIGHTS OR OTHERWISE CAUSING INJURY.
'OPPRESSION' MEANS DESPICABLE CONDUCT THAT
SUBJECTS A PERSON TO CRUEL AND UNJUST HARDSHIP IN
CONSCIOUS DISREGARD OF THAT PERSON'S RIGHTS.
"YOU MAY FIND A PRINCIPAL OR EMPLOYER GUILTY OF
MALICE, FRAUD OR OPPRESSION BASED UPON ACTS OF AN
AGENT IF, BUT ONLY IF, YOU FIND BY CLEAR AND
5388
CONVINCING EVIDENCE THAT THE PRINCIPAL OR
EMPLOYER AUTHORIZED OR RATIFIED THE CONDUCT WHICH
IS FOUND TO BE MALICE, FRAUD OR OPPRESSION.
IF THE PRINCIPAL OR EMPLOYER IS A CORPORATION,
THE ACT OF MALICE, FRAUD OR OPPRESSION,
AUTHORIZATION, OR RATIFICATION MUST BE ON THE
PART OF AN OFFICER, DIRECTOR, OR MANAGING AGENT OF
THE CORPORATION.
AN AGENT IS A PERSON WHO, AT A GIVEN TIME, IS
AUTHORIZED TO ACT FOR OR IN PLACE OF ANOTHER
PERSON, CALLED A PRINCIPAL. FOR THE PURPOSES OF
THIS TRIAL, THE TERM 'AGENT' INCLUDES EMPLOYEES,
AND THE TERM 'PRINCIPAL' INCLUDES EMPLOYERS.
UNDER THE LAW, THE TERM 'MANAGING AGENT' MEANS
THOSE CORPORATE EMPLOYEES, AND ONLY THOSE
CORPORATE EMPLOYEES" -- EXCUSE ME.
UNDER THE LAW, THE TERM 'MANAGING AGENT' MEANS
THOSE CORPORATE EMPLOYEES, AND ONLY THOSE
EMPLOYEES, WHO EXERCISE SUBSTANTIAL INDEPENDENT
AUTHORITY AND JUDGMENT IN THEIR CORPORATE
DECISION-MAKING SO THAT THEIR DECISIONS
ULTIMATELY DETERMINE CORPORATE POLICY.
"I HAVE NOT INTENDED BY ANYTHING I HAVE SAID OR
DONE, OR BY ANY QUESTIONS THAT I HAVE ASKED, TO
SUGGEST HOW YOU SHOULD DECIDE ANY QUESTIONS OF
FACT, OR THAT I BELIEVE OR DISBELIEVE ANY
WITNESS.
IF ANYTHING I HAVE DONE OR SAID HAS SEEMED

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SO TO
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INDICATE, YOU MUST DISREGARD IT AND FORM YOUR OWN
OPINION.
"THE PURPOSE OF THE COURT'S INSTRUCTIONS IS TO
INSTRUCT YOU AS TO THE APPLICABLE LAW SO THAT YOU
MAY ARRIVE AT A JUST AND LAWFUL VERDICT. WHETHER
SOME INSTRUCTIONS APPLY WILL DEPEND UPON WHAT YOU
FIND TO BE THE FACTS. EVEN THOUGH I HAVE
INSTRUCTED YOU ON VARIOUS SUBJECTS, INCLUDING
COMPENSATORY AND PUNITIVE DAMAGES, YOU MUST NOT
TREAT THE INSTRUCTIONS AS INDICATING THE COURT'S
OPINION ON HOW YOU SHOULD DECIDE ANY ISSUE IN
THIS CASE, OR AS TO WHICH PARTY IS ENTITLED TO
YOUR VERDICT."
THOSE ARE THE INSTRUCTIONS THAT I WANT TO GIVE
YOU BEFORE THE LAWYERS MAKE THEIR CLOSING ARGUMENTS. AND WE
ARE GOING TO PROCEED WITH THAT AFTER A 20-MINUTE RECESS.
AS YOU KNOW, IT IS ABSOLUTELY CRITICAL THAT YOU
CONTINUE TO FOLLOW THE ADMONITION. SO PLEASE DO SO. LET'S
TAKE A 20-MINUTE RECESS, PLEASE, TO 25 MINUTES TO 11:00.
(RECESS TAKEN FROM 10:14 TO 10:40 A.M.)
THE COURT: WE ARE BACK ON THE RECORD.
AND I THINK WE ARE READY TO PROCEED WITH THE
CLOSING ARGUMENT, MR. BROWN.

CLOSING ARGUMENT BY MR. BROWN

MR. BROWN: THIS IS A SERIOUS CASE. IT IS A
SERIOUS MOMENT.
I WANT TO START BY GIVING EVERYONE IN THIS JURY
5390
WHO I UPSET AND CAUSED SOME PAIN MY SINCERE APOLOGY FOR AN
INNUENDO THAT WAS CONTAINED IN ONE OF MY QUESTIONS. IT WAS
NOT INTENDED, BUT IT HAPPENED. I'M SORRY.
WHEN THIS CASE IS OVER, YOU CAN TALK TO ME, BUT I
ASK YOU NOW TO PLEASE NOT TAKE WHAT I DID, NOT ONLY THEN BUT
ANY TIME, OUT ON MY CLIENT LESLIE WHITELEY, BUT TO DO WHAT I
HAVE EVERY INDICATION, FROM WATCHING YOU, THAT YOU WILL DO,

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TO DECIDE THIS CASE BASED ON THE EVIDENCE AND BASED UPON THE
INSTRUCTIONS THAT THE COURT HAS JUST GIVEN YOU.
NOW, I SAID THIS WAS A SERIOUS CASE. AND OF
COURSE, EVERY CASE IN THIS BUILDING IS SERIOUS AND EVERY ONE
OF THEM IS IMPORTANT, AND TO THE PARTIES IN EVERY ONE OF
THOSE CASES IN THIS BUILDING, IT'S VERY IMPORTANT.
AND SO, WITH THAT CONTEXT, THIS CASE IS VERY
IMPORTANT. THIS CASE, LIKE SOME OTHER CASES THAT COME
BEFORE THE JURY AND THE COURT, RISES TO A HIGHER LEVEL
BECAUSE THIS CASE IS GOING TO HAVE SOME KIND OF AN IMPACT,
REGARDLESS OF HOW IT'S DECIDED, ON ONE OF THE MOST CRITICAL
HEALTH CRISES THAT THE UNITED STATES AND PERHAPS THE WORLD
HAS EVER SEEN.
MR. FURR: OBJECTION, YOUR HONOR. IMPROPER
ARGUMENT.
THE COURT: SUSTAINED.
MR. BROWN: I'M GOING TO START THE ARGUMENT ON
THE FACTS BY ASKING THIS -- I'M GOING ASK A QUESTION FOR THE
DEFENSE COUNSEL TO RESPOND TO. AND I THINK IT'S A QUESTION
THAT CUTS ACROSS EVERYTHING THAT YOU WILL BE DECIDING.
THIS IS A QUESTION WHICH COMES ALMOST INTO PLAY
5391
IN ALMOST EVERY ISSUE THAT YOU'RE GOING TO BE ADDRESSING.
THE QUESTION IS THIS: AT VARIOUS TIMES, WHICH I'LL MENTION,
DID PHILIP MORRIS OR R.J. REYNOLDS OR BOTH OF THEM, DID THEY
KNOW, DID THEY UNDERSTAND -- A MORE IMPORTANT WORD -- DID
THEY UNDERSTAND AND BELIEVE THAT THEIR PRODUCT, THEIR
CIGARETTE PRODUCTS, WERE CAUSING THE LUNG CANCER, AND THAT
THOSE PRODUCTS WERE RESULTING IN THE DEATH OF MANY, MANY
PEOPLE?
AND THAT QUESTION CAN BE ASKED, FIRST, AS OF
1954. BECAUSE THAT'S THE YEAR THAT THE DEFENDANTS IN THIS
CASE CAME TOGETHER AND FORMED A CONSPIRACY, ALONG WITH
OTHERS WHOSE NAMES APPEAR AND ARE SIGNED ON THE BOTTOM OF
THE FRANK STATEMENT, WHICH YOU HAVE HAD SHOWN TO YOU.
IT'S ALSO AN IMPORTANT QUESTION TO ASK IN 1959.
THAT'S THE YEAR LESLIE WHITELEY WAS BORN.
AND IT'S IMPORTANT TO ASK IN 1964, BECAUSE THAT'S
THE YEAR THAT A DEFENSE WITNESS NAMED DR. TASHKIN TOLD

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YOU
18 THAT, IN HIS OPINION, THE EVIDENCE THAT LUNG CANCER
WAS
19 CAUSED BY CIGARETTE SMOKE WAS CONCLUSIVELY
ESTABLISHED. HE
20 ALSO SAID THAT HE BELIEVED IT IN 1954.
21 AND THEN AGAIN, IT'S IMPORTANT TO ASK THAT
22 QUESTION IN 1972, BECAUSE THAT'S THE YEAR THAT LESLIE
23 WHITELEY BEGAN TO SMOKE.
24 AND WE COULD MARCH ON UP THOUGH TIME. I
COULD
25 ASK IT AS OF 1984, BECAUSE THAT'S THE YEAR I READ A
DOCUMENT
26 IN PART TO YOU -- THAT'S EXHIBIT 456 -- WHICH IS A
TOBACCO
27 INSTITUTE PUBLIC STATEMENT IN WHICH THEY POOPOO THE
WHOLE
28 IDEA AND THEY CALL IT THEORY, MERELY A THEORY, NOT
5392
1 ESTABLISHED.
2 AND, IN FACT, WE CAN ASK THAT QUESTION AS
OF
3 TODAY. THERE WAS REFERENCE IN THE EVIDENCE THAT LAST
YEAR,
4 PHILIP MORRIS PUT ON THEIR WEBSITE SOMETHING TO THE
EFFECT
5 OF "IT HAS BEEN -- IT IS CONCLUSIVELY ESTABLISHED" --
6 WITHOUT READING IT, I'M NOT SURE I CAN STATE IT, BUT
THE
7 IDEA WAS THAT THE SCIENTIFIC AND THE MEDICAL COMMUNITY
HAD
8 CONCLUSIVELY -- A CONSENSUS -- OKAY. NOW I REMEMBER
IT.
9 IT WAS STATED THAT THERE WAS A CONSENSUS OF
THE
10 SCIENTIFIC AND MEDICAL COMMUNITY THAT LUNG CANCER WAS
CAUSED
11 BY CIGARETTE SMOKING, AS WELL AS HEART DISEASE AND
12 EMPHYSEMA. THAT WAS ON THEIR WEBSITE.
13 BUT THAT WASN'T PHILIP MORRIS SAYING "WE,
AS A
14 CORPORATION, BELIEVE IT." THAT WAS THEIR SAYING WHAT
HAD
15 BEEN TRUE FOR 20 OR 30 YEARS, AT LEAST, THAT THE
SCIENTIFIC
16 AND THE MEDICAL COMMUNITY BELIEVED IT AND KNEW IT TO
BE A
17 FACT.
18 SO EVEN TODAY, THE ANSWER TO THAT QUESTION
IS A
19 MYSTERY. AND IN SOME WAYS, YOU COULD SAY THIS IS A
MOMENT
20 OF TRUTH.
21 WILL PHILIP MORRIS, A CORPORATION, STAND UP
HERE
22 IN FRONT OF YOU, WITH THEIR ATTORNEYS REPRESENTING
PHILIP
23 MORRIS AND R.J. REYNOLDS, AND ANSWER THAT QUESTION
24 TRUTHFULLY? WILL THEY ANSWER IT AT ALL? WILL THEY
EVADE
25 IT? WILL THEY GIVE YOU AN EVASIVE ANSWER? THAT'S THE
26 QUESTION.
27 NOW, I'M GOING TO GIVE YOU A BRIEF OVERVIEW

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OF
28 THE TIMES AND THE HISTORY OF WHAT WAS GOING ON DURING
LESLIE
5393
1 WHITELEY'S LIFE AND A SHORT PERIOD OF TIME BEFORE
THAT.
2 LESLIE WHITELEY, YOU KNOW, WAS BORN IN
1959. AND
3 AT THE TIME OF HER BIRTH, THERE WAS AN OVERWHELMING
MEDICAL
4 EPIDEMIC IN PROGRESS THROUGHOUT THE WORLD AND IN THE
UNITED
5 STATES, WHICH WAS LUNG CANCER.
6 EVEN AT THE BEGINNING OF THE 1930S, LUNG
CANCER
7 WAS A RARE DISEASE. BY 1959, IT WAS NOT A RARE
DISEASE, BUT
8 WAS NOT GENERALLY APPRECIATED IN THE PUBLIC, COMING AT
LEAST
9 INTO THE EARLY '50S, THAT HAD BECOME AN EPIDEMIC. AND
IT
10 WAS NOT GENERALLY APPRECIATED WHAT WAS DOING -- WHAT
WAS
11 CAUSING IT.
12 IN THE EARLY 1950S, YOU HEARD -- I WON'T GO
INTO
13 DETAIL ABOUT IT -- ABOUT THE DOLL AND HILL STUDIES,
14 EPIDEMIOLOGICAL STUDIES, WHICH VERY STRONGLY EVIDENCED
THAT
15 LUNG CANCER AND THE WORLDWIDE EPIDEMIC, WHICH WAS HUGE
16 NUMBERS OF LUNG CANCER THAT HAD NEVER BEEN ON THE
RADAR
17 SCREEN BEFORE WERE BEING CAUSED BY SMOKING. AND MANY
OTHER
18 EPIDEMIOLOGICAL STUDIES FOLLOWED AND ESTABLISHED THAT.
19 AND THERE WAS THE MOUSE-PAINTING, WHICH
20 INDICATED -- STRONGLY SHOWED THAT THERE WAS BIOLOGICAL
21 PLAUSIBILITY THAT IN FACT THE CONTENTS -- THE
CONSTITUENTS
22 OF CIGARETTE SMOKE WOULD CAUSE TUMORS AND CANCER ON
MICE.
23 AND AT THE TIME, AND AFTER, AND IN THE
DECADES
24 FOLLOWING LESLIE WHITELEY'S BIRTH, THE EPIDEMIC GREW.
AND
25 THE NUMBER OF PEOPLE WHO WERE DYING FROM IT, FROM
VARIOUS
26 DISEASES, ESPECIALLY LUNG CANCER, GREW WITH IT.
27 IN THE EARLY '50S, WHEN THE WORD FIRST
BEGAN TO
28 COME OUT -- REMEMBER, THERE WAS A READER'S DIGEST
ARTICLE
5394
1 ABOUT IT -- AND EMERGED WITH WHAT'S KNOWN AS THE
CANCER
2 SCARE. AND THE CANCER SCARE RESULTED IN A DECLINE OF
3 CIGARETTE PURCHASES.
4 BUT THEN, IN 1954, THE FRANK STATEMENT WAS
ISSUED
5 BY -- I THINK IT'S 13 OR PERHAPS 14 TOBACCO COMPANIES,
AND
6 PHILIP MORRIS AND R.J. REYNOLDS WERE PROMINENT. THEY
WERE

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THERE.
THIS IS MY COPY OF EVIDENCE 363. AND DOWN AT THE
BOTTOM, YOU SEE A LOT OF COMPANIES' NAMES AND THEY'RE SIGNED
OFF BY THE PRESIDENTS AND SO FORTH.
IT WAS BORN BEFORE THIS DOCUMENT, BUT I THINK,
WITH COMPLETE CONVICTION, WE CAN SAY, BY THE TIME THIS
DOCUMENT CAME OUT AND WENT AROUND THE UNITED STATES, IN ALL
THOSE NEWSPAPERS YOU HEARD ABOUT, THE CONSPIRACY WAS
FORMED.
AND THE INTENT OF THE CONSPIRACY WAS QUITE
CLEAR. THE TOBACCO INDUSTRY AND PHILIP MORRIS AND R.J.
REYNOLDS WERE UNDER SIEGE. IF THE UNITED STATES AND THE
POPULATION OF THE UNITED STATES THAT WERE SMOKERS REALLY
BEGAN TO BELIEVE THAT LUNG CANCER CAME FROM SMOKING
CIGARETTES, THEIR INDUSTRY WAS IN A VERY SERIOUS ECONOMIC
POSITION.
SO THEY CAME TOGETHER, AS YOU REMEMBER, AT THE
PLAZA HOTEL IN '53, AND THEN THEY DECIDED TO -- RATHER THAN
TO DEAL WITH THE MEDICAL PROBLEMS, THEY DECIDED TO HIRE A
PUBLIC RELATIONS FIRM TO DEAL WITH WHAT PEOPLE UNDERSTOOD,
HILL AND KNOWLTON, AND THEY DRAFTED THIS "FRANK STATEMENT TO
CIGARETTE SMOKERS."
5395
YOU WILL HEAR A LOT MORE ABOUT THAT LATER. I'M
JUST GIVING YOU AN OVERVIEW. AND MANY PROMISES IN THAT.
THEY MADE STATEMENTS OF FACT IN THAT. AND THE PROMISES WERE
FRAUDULENT PROMISES. THEY WERE NEVER KEPT. AND THE
STATEMENTS THEY MADE ABOUT WHETHER THERE WAS A LINK TO LUNG
CANCER WERE FALSE AND THEY KNEW THEM TO BE FALSE.
AND THEY SAID SOME THINGS WHICH NOT ONLY WERE
PROMISES, THEY WERE DEEPLY IRONIC AND SET THE TONE FOR WHAT
THEY WERE GOING TO DO FOR THE NEXT 50 YEARS, AND WHICH IS
STILL GOING ON.
THEY SAID AT THE BOTTOM OF IT -- THE LAST
PARAGRAPH, THEY SAY: "THIS STATEMENT IS BEING ISSUED
BECAUSE WE BELIEVE THE PEOPLE ARE ENTITLED TO KNOW WHERE WE
STAND ON THIS MATTER AND WHAT WE INTEND TO DO ABOUT IT."
FROM THAT TIME ON, DOWN TO THE PRESENT TIME, IT
HAS BEEN ONE FRAUD AFTER ANOTHER, ONE CONCEALMENT AFTER

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ANOTHER, ONE REACTION TO PUBLIC HEALTH ANNOUNCEMENTS ABOUT THE SERIOUSNESS OF SMOKING AFTER ANOTHER.

A QUICK REACTION, A QUICK RESPONSE TO EVERY MAJOR PUBLIC HEALTH STATEMENT. A MAJOR EFFORT TO CONFUSE, MISLEAD THE SMOKERS AND THE NONSMOKERS OF AMERICA.

AND THEY MADE ONE OTHER COMMENT THAT I WILL REFER TO NOW, AND LATER WILL BE REFERRED TO PROBABLY IN MORE DETAIL. THEY SAID: "WE WILL ALWAYS -- WE ALWAYS HAVE AND ALWAYS WILL COOPERATE CLOSELY WITH THOSE WHOSE TASK IT IS TO SAFEGUARD PUBLIC HEALTH."

THAT WAS A FALSE STATEMENT. THEY KNEW IT WAS FALSE. LET'S LOOK AT WHAT THEY DID. THIS IS JUST ONE AREA

5396

OF THEIR VERSION OF COOPERATION.

AND AFTER THAT, AND I HAVE JUST MENTIONED IT, THEY POURED INTO THE PUBLIC ARENA FRAUDULENT STATEMENTS ABOUT THE EFFECT OF SMOKING. WHEN THE PUBLIC HEALTH PEOPLE WERE TRYING TO BRING TO THE ATTENTION OF SMOKERS THAT CIGARETTES WERE NOT JUST BAD FOR YOU, THEY DIDN'T JUST SLOW YOU DOWN IF YOU WANTED TO BE AN ATHLETE, THEY DIDN'T JUST GIVE YOU A SMOKER'S COUGH, BUT THEY WERE A HIGH RISK OF DEADLY DISEASE, THE PUBLIC HEALTH PEOPLE TRIED TO GET THAT WORD ACROSS, WHO WAS IT THAT CAME BACK WITH A COUNTER AND SAID "NO. NOT PROVED. NO EVIDENCE. THERE IS A REAL CONTROVERSY OUT THERE?"

THEY SAID THERE WAS A CONTROVERSY ALL RIGHT. THERE WAS THE PUBLIC HEALTH ON ONE SIDE AND THERE WAS A PROPAGANDA MACHINE FROM THE TOBACCO INDUSTRY ON THE OTHER. THAT WAS THE CONTROVERSY. AND THEY KEPT TALKING ABOUT THAT LACK OF PROOF. AND THEY KEPT TALKING ABOUT THAT CONTROVERSY OVER THE LAST 50 YEARS.

NOW, I'M NOT GOING TO HAVE TIME TO SHOW YOU A LOT OF DOCUMENTS SO I'M NOT, BUT I'M GOING TO GIVE YOU SOME REFERENCES TO SOME EXHIBITS IN WHICH THE FRAUD AND FALSE STATEMENTS I'VE BEEN TALKING ABOUT CAN BE FOUND.

THESE ARE EVIDENCE NUMBERS.

333, A 1958 TOBACCO INSTITUTE PRESS RELEASE.

335, AN EXECUTIVE COMMITTEE OF THE TOBACCO

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INSTITUTE, A POLICY STATEMENT IN WHICH YOU'LL FIND THAT
THEIR POLICY IS THAT, FALSELY, TOBACCO DOES NOT CAUSE LUNG
CANCER.

5397

330, CORRESPONDENCE FROM THE TOBACCO INSTITUTE TO
THE AMERICAN CANCER SOCIETY, TELLING THEM THAT THEY DON'T
BELIEVE, AS THE AMERICAN CANCER SOCIETY DID BY THEN, THAT
TOBACCO WAS CAUSING LUNG CANCER.
AND THAT LAST ONE, AS I RECALL, AROUND 1970 --
THAT'S SEVEN YEARS AFTER DR. TASHKIN HAS TOLD YOU THAT, IN
HIS OPINION, THE EVIDENCE WAS CONCLUSIVELY -- CONCLUSIVELY
ESTABLISHED THE CONNECTION BETWEEN SMOKING AND LUNG CANCER.
A DEFENSE WITNESS TOLD YOU THAT.
337, 1960, ANOTHER PRESS RELEASE. ANOTHER ATTACK
ON THE AMERICAN CANCER SOCIETY.
336, AN ATTACK ON THE AMERICAN PUBLIC HEALTH
ASSOCIATION, WHICH THEY CALLED JUST AN ANTISMOKING GROUP.
THIS WAS THEIR COOPERATION.
338. NOW COMES A CONFUSING TACTIC. THEY WANT
THE AMERICAN PUBLIC TO BELIEVE THAT LUNG CANCER IS CAUSED BY
MANY, MANY THINGS.
WELL, IT IS, BUT IT'S TERRIBLY MISLEADING, WHEN
YOU SAY THAT LUNG CANCER IS A RESULT OF MANY, MANY CAUSES,
BUT YOU FORGET TO MENTION AS THE EVIDENCE HERE DEMONSTRATED
TO YOU, WITHOUT CONTRADICTION, OVER 90 PERCENT OF LUNG
CANCER IS CAUSED BY SMOKING. OVER 90 PERCENT. TESTIFIED TO
BY DRS. BURNS, DAVIS -- I'M NOT SURE IF BENOWITZ SAID THAT
OR NOT.
AND NO DOCTOR CAME IN FRONT OF YOU HERE, NO
MEDICAL TESTIMONY CAME IN AND SAID THAT'S NOT TRUE.
SO WHAT ARE ALL THESE OTHER CAUSES? DR. WECKER
HAD IDEAS. IT WAS NOT EATING LEAFY VEGETABLES. I CAN'T

5398

REMEMBER. RADON CAUSES IT. COMPARED TO SMOKING, IT'S A
DROP IN THE OCEAN. BUT THAT'S NOT WHERE IT IS.
SO THEY COME TO YOU WITH A STORY THAT LOTS OF
THINGS CAUSE IT, AND THEY TRY TO LINK IT, AS IN 338, TO A
VIRUS, TO AIR POLLUTION, WHICH DOES CAUSE IT, I SUPPOSE, OR

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AT LEAST MIGHT CONTRIBUTE, OR TO TB, TUBERCULOSIS. THEY'RE BEING EXTRAORDINARILY MISLEADING.

339. ANOTHER ATTACK ON THOSE WHO WOULD BRING TO THE ATTENTION OF THE AMERICAN PEOPLE THAT LUNG CANCER AND HEART DISEASE WAS CAUSED BY SMOKING.

340, AN ATTACK ON THE JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION, AN ARTICLE ENTITLED "PREVENTATIVE STEPS INDICATED BY SMOKING: LUNG CANCER RISK." THEY ATTACKED THAT ARTICLE.

HERE WAS AN ARTICLE IN THE AMA THAT WAS DESIGNED TO ASSIST PEOPLE IN PREVENTING THEIR GETTING LUNG CANCER.

AND WHO IS ATTACKING IT? RJR, PHILIP MORRIS AND THEIR PROPAGANDA MOUTHPIECE, THE TOBACCO INSTITUTE.

IN THAT FRANK STATEMENT, BY THE WAY, IT TELLS YOU THAT THEY ARE CREATING THE TOBACCO INDUSTRY RESEARCH COMMITTEE, TIRC.

AND THEN WE KNOW FROM THE EVIDENCE THAT TIRC DIVIDED, LIKE AN AMEBA, INTO THE CTR AND IT DIVIDED INTO THE TOBACCO INSTITUTE. SO WHENEVER THE TOBACCO INSTITUTE SPEAKS, PHILIP MORRIS SPEAKS. WHENEVER IT SPEAKS, RJR SPEAKS.

1962, EVIDENCE 342, STILL DENYING.

343, 344, 346, THEY TRIED TO TIE THE RELATIONSHIP

5399

BETWEEN CANCER -- LUNG CANCER AND THE PERSONALITY OF THE PERSON WITH THE LUNG CANCER.

OVER THE ENTIRE 50 YEARS, THERE HAS BEEN A COMMON THEME, THAT EVERYTHING CAUSES IT BUT CIGARETTE SMOKE. TB, AIR POLLUTION, RADON, LEAFY VEGETABLES, ASBESTOS, GENETICS; IT ALL CAUSES IT, BUT NOT SMOKING.

AND MAYBE YOU'RE HEARING SOMETHING THAT SOUNDS FAMILIAR, BECAUSE THAT'S WHAT THEY HAVE DONE IN THIS CASE TOO. EVERYTHING CAUSED IT BUT THE SMOKING.

456 IS THE ONE I REFERRED TO. THAT'S 1984 -- 1983, THEY ATTACKED THE IDEA THAT IT'S ADDICTIVE.

AND IT GOES ON AND IT GOES ON. AND THE ATTEMPT WAS VERY CLEAR. THE INTENT WAS TO PERSUADE PEOPLE WHAT THEY WERE HEARING WAS NOT TRUE, THAT SMOKING WAS NOT CAUSED -- THAT LUNG CANCER WAS NOT CAUSED BY SMOKING.

AND IN GENERAL, IT WORKED. IT WORKED FOR MANY,

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MANY PEOPLE, AND IT WORKED WITH LESLIE WHITELEY.
ALL RIGHT. I'M GOING TO MOVE, BECAUSE OF TIME
RESTRAINTS, TO THE TWO CLAIMS THAT I'M -- THREE CLAIMS I'M
GOING TO TALK ABOUT; NEGLIGENCE, NEGLIGENT FAILURE TO WARN,
AND THE ASBSESTOS METALCLAD CLAIM.
FOLLOWING THAT, I'M GOING TO TALK ABOUT THE
SUBJECT OF CAUSATION, WHICH APPLIES TO NOT ONLY ALL OF THOSE
BUT TO THE OTHER CLAIMS, WHICH MADELYN CHABER WILL TALK TO
YOU ABOUT.
FIRST, NEGLIGENCE. I'M GOING TO PUT ON THE BOARD
A DEFINITION OF "NEGLIGENCE," WHICH IS PAGE 31 OF THE
INSTRUCTIONS.
5400
(ATTORNEYS CONFER)
MR. BROWN: I DON'T KNOW THAT YOU CAN READ IT
FROM THAT DISTANCE. IF I WERE YOU, I COULDN'T READ IT. I
COULDN'T SEE IT THAT FAR. IT WAS READ TO YOU THIS MORNING.
I THINK THERE'S JUST ONE -- TWO THINGS THAT I
WOULD POINT TO. ONE IS:
"NEGLIGENCE IS THE DOING OF SOMETHING WHICH A
REASONABLY PRUDENT PERSON WOULD NOT DO, OR THE
FAILURE TO DO SOMETHING WHICH A REASONABLY
PRUDENT PERSON" -- I'M NOT SURE I CAN READ IT
FROM HERE. I WILL GO BACK. I NEVER LIKED THAT MACHINE
ANYWAY.
YOU CAN BEING TURN THE LIGHTS BACK ON. THIS ONE
I CAN READ.
"NEGLIGENCE IS THE DOING OF SOMETHING WHICH A
REASONABLY PRUDENT PERSON WOULD NOT DO, OR THE
FAILURE TO DO SOMETHING WHICH A REASONABLY
PRUDENT PERSON WOULD DO, UNDER CIRCUMSTANCES
SIMILAR TO THOSE SHOWN BY THE EVIDENCE.
IT IS THE FAILURE TO USE ORDINARY OR REASONABLE
CARE.
ORDINARY OR REASONABLE CARE IS THAT CARE WHICH
PERSONS OF ORDINARY PRUDENCE WOULD USE IN ORDER
TO AVOID INJURY TO THEMSELVES OR OTHERS
UNDER CIRCUMSTANCES SIMILAR TO THOSE SHOWN BY THE
EVIDENCE."
WHAT ARE THE CIRCUMSTANCES? THE MANUFACTURER OF

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A PRODUCT WHICH IS KILLING THOUSANDS OF PEOPLE, AND AS TIME
5401
GOES ON, OVER THE PERIOD OF TIME WE'RE DISCUSSING HERE, THE
THOUSANDS GROW INTO HUNDREDS OF THOUSANDS. AND THEIR
PRODUCT, ALL OF THEIR PRODUCTS ARE DOING JUST THAT. AND THE
PRODUCTS THAT WERE BEING SMOKED BY LESLIE WHITELEY ARE DOING
JUST THAT.
AND SO IT'S THAT CIRCUMSTANCE. WE LOOK AT WHAT
WILL BE REASONABLE AND WHAT PHILIP MORRIS AND RJR WOULD BE
ABLE TO DO.
WELL, I THINK, AS SORT OF A BASE, THAT THEY WOULD
DO EVERYTHING THEY COULD TO STOP THE DEATHS. THAT WOULD BE
CERTAINLY A REASONABLE AND A PRUDENT THING TO DO.
WE KNOW -- WE TALK ABOUT SO MANY -- AS WE HAVE IN
THIS CASE SO MANY TIMES -- THESE ENORMOUS FIGURES. IT NUMBS
THE MIND. IT GETS TO THE POINT WHERE USING THE NUMBERS
DROPS OFF. IT'S LIKE WATER OFF A DUCK'S BACK, BECAUSE WE
GET USED TO HEARING THESE HUGE, HUGE NUMBERS THAT ARE DYING
EVERY YEAR. SO SOMETIMES, IT'S HARD TO REALLY KNOW JUST HOW
BAD THIS SITUATION HAS BECOME AND HAS BEEN OVER THE LAST 30
YEARS.
AND THERE ARE STATISTICAL WAYS TO MAKE IT MORE
REALISTIC. I DON'T KNOW IF THEY HELP OR NOT. AND YOU CAN
SAY X NUMBER OF 747S WOULD HAVE CRASHED. YOU CAN SAY FOUR
OR FIVE SUPERBOWL CAPACITY CROWDS WOULD BE KILLED EVERY YEAR
OR ROSE BOWL CROWDS. I DON'T KNOW IF THAT'S MEANINGFUL OR
NOT, BUT IT IS MIND-NUMBING WHEN YOU THINK OF THE NUMBER OF
PEOPLE GOING DOWN.
SO WHAT DID -- WHAT DID THE DEFENDANTS DO? WHAT
DID PHILIP MORRIS DO IN THIS CONTEXT OF NEGLIGENCE? FAILING
5402
TO DO SOMETHING THAT WAS NOT PRUDENT, NOT WITHIN THE
CONCEPTS OF REASONABLE CARE.
WELL, FOR ONE THING, WITH AN ABSOLUTE KNOWLEDGE
THAT THEIR CIGARETTES WERE KILLING PEOPLE, THEY DIDN'T MAKE
A SINGLE SIGNIFICANT CHANGE IN THEIR CIGARETTES' DESIGN, AND
THEY COULD HAVE DONE SO. AND WE'LL TALK ABOUT WHAT

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THEY
WERE VERY SPECIFICALLY.
INSTEAD, THEY LOOKED FOR DESIGNS TO REASSURE THE
PUBLIC. THEY CAME OUT WITH CIGARETTES CALLED LIGHTS,
ULTRALIGHTS.
NOW, PERHAPS ONE OF THE MOST IMPORTANT WITNESSES
ON NEGLIGENCE WAS DR. BILL FARONE, WHO HAS BEEN THERE.
HE
WORKED IN THE LABORATORIES OF PHILIP MORRIS FROM 1976 TO
1984. AND HE TOLD YOU OF A GREAT VARIETY OF THINGS THAT
THEY COULD DO THAT WOULD HAVE MADE THE CIGARETTES MUCH, MUCH
SAFER.
THEY WOULD HAVE REDUCED THE CANCER PROBABILITIES
CONSIDERABLY. AND IF EVERYTHING THAT HE SUGGESTED WAS DONE,
IT WOULD HAVE REDUCED IT FAR DOWN BELOW THE VERY HIGH RISK
THAT EXISTS NOW.
HE TOLD YOU ABOUT NITROSAMINES, TWO TYPES; TS,
TOBACCO-SPECIFIC, AND VOLATILE NITROSAMINES. AND HE TOLD
YOU THEY COULD BE ELIMINATED. "VIRTUALLY ELIMINATED" WAS
HIS ACTUAL WORDS. AND THE EVIDENCE SHOWED THEY DID NOT DO
ANY OF THE THINGS THAT HE SUGGESTED.
WHAT DID HE SUGGEST? TOBACCO STRAINS COULD BE
SELECTED. TOBACCO STRAINS WHICH WERE NOT AS HIGH IN
NITROSAMINES. CURING. INSTEAD OF HEATING, LETTING THEM
5403
DRY, SOMETHING THAT R.J. REYNOLDS PROUDLY ANNOUNCED THAT
THEY STARTED TO DO LAST YEAR, IN 1998. DR. FARONE TOLD YOU
IT WAS AVAILABLE IN 1976 AND BEFORE THAT.
WHAT ELSE DID THEY DO? WELL, THEY SAID THEY
LOWERED THE NICOTINE AND TAR. BUT THEN, ON FURTHER
EXAMINATION, IT TURNS OUT THAT DIDN'T HAVE ANY SAFETY EFFECT
AT ALL, BECAUSE EVEN THOUGH TAR IS WHERE THE BAD STUFF IS
AND THE NICOTINE IS, AND ALL OF THE CARCINOGENS AND ALL THE
OTHER PARTICULATES THAT ARE CAUSING THE LUNG CANCERS AND THE
OTHER DISEASES, BY LOWERING THE TAR, BY LOWERING THE
NICOTINE, ALL THEY DID WAS TO FALL RIGHT INTO SOMETHING THEY
RECOGNIZED CALLED COMPENSATION.
SO THAT SMOKERS HAD A CIGARETTE IN THEIR HANDS,
THOUGHT THEY HAD A SAFER CIGARETTE, AND THEY DIDN'T, BECAUSE

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THEY WOULD COMPENSATE FOR THE LOWER TAR AND NICOTINE, AND THEY'D SMOKE MORE, THEY'D SMOKE DEEPER, THEY'D HOLD THEIR BREATH LONGER.

AND IN TERMS OF WHAT REAL NICOTINE OR TAR A CIGARETTE WAS YIELDING TO REAL SMOKERS, THEY RELIED UPON TESTS OF -- A BREATHING MACHINE TEST, WHICH WAS APPROVED BY THE FTC, BUT IT WAS A TEST THAT THE TOBACCO PEOPLE KNEW WAS NOT GIVING THEM A REAL AND ACTUAL YIELD OF TAR AND NICOTINE TO THE SMOKER.

AND THEN WE FIND OUT THAT WHEN MASSACHUSETTS AND TEXAS DEMANDED A REAL SMOKING TEST TO FIND OUT WHAT REAL SMOKERS GOT IN THE WAY OF YIELD, WE LEARNED IT DOUBLED FROM WHAT THE PUBLIC WAS BEING TOLD.

THEY PUT ON FILTERS. BUT DR. FARONE TOLD US THAT

5404

THE FILTERS THEY PUT ON WERE NOT ANYWHERE NEAR AS EFFECTIVE AS THEY COULD HAVE BEEN.

HE TOLD US THAT NITROSAMINES COULD BE VIRTUALLY ELIMINATED BY FILTERS. HE TOLD US THAT THE CHARCOAL FILTER WAS THE BEST FILTER AVAILABLE.

WE KNOW NOT ONE MARLBORO CIGARETTE HAS A CHARCOAL FILTER, ALTHOUGH THOSE COMPANIES USE CHARCOAL FILTERS. THEY'VE BEEN USED IN JAPAN. AND THEY DEFINITELY CUT DOWN THE PARTICULATES AND CUT DOWN THE CARCINOGENS THAT WERE BEING -- THAT WERE BEING YIELDED INTO THE SMOKERS' MOUTHS.

WHAT ELSE DID THE COMPANIES DO? THEY PUT THE VENTILATION HOLES AND POROUS PAPERS. AS IT TURNED OUT, THAT ACCOMPLISHED NOTHING. THEY KNEW THAT RIGHT AWAY.

SO THEY KNEW THAT THE ACTION THAT THEY HAD TAKEN, FOR WHATEVER REASON IT WAS -- I WOULD SUGGEST TO YOU THERE'S AN EQUALLY VALID REASON FOR THEIR HAVING DONE IT, WHICH COMES DOWN TO MARKETING.

BECAUSE EVERYBODY WAS DOING IT. AND IF SOMEBODY ELSE HAD VENT HOLES AND SOMEBODY ELSE HAD FILTERS AND IF THEY DIDN'T HAVE VENT HOLES AND FILTERS, THEY'D FALL BEHIND IN THE MARKET.

WHATEVER THEIR MOTIVATION WAS, IT DIDN'T WORK,

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AND THEY KNEW IT DIDN'T WORK. THEY NEGLIGENTLY PLACED THE VENTILATION HOLES SO THAT YOU COULDN'T SEE THEM. THEY ARE IN A PLACE WHERE YOU COULD COVER THEM UP WITH YOUR FINGERS.
IF THEY WERE COVERED UP, THEY DIDN'T WORK.
SO TO GO QUICKLY THROUGH THE REST OF IT, DR. FARONE HAS TOLD YOU THEY COULD HAVE ELIMINATED OR
5405
SHARPLY REDUCED NITROSAMINES, ALDEHYDES, WHAT WE CALL PAH'S,
THAT'S THE POLYCYCLIC AROMATIC HYDROCARBONS. THEY COULD
HAVE DONE THE SAME WITH METALS, WHICH INCLUDES
RADIOISOTOPES.
AND HE TESTIFIED THAT THE TECHNOLOGY EXISTED TO
REDUCE ALL OF THOSE COMPOUNDS, NITROSAMINES, ALDEHYDES, PAH,
THOSE METALS, CARBON MONOXIDE AND NITROUS OXIDE.
AND REMEMBER, LUNG CANCER IS A DOSE/RESPONSE
DISEASE. IF YOU SMOKE LESS, THERE'S LESS RISK. IF YOU STOP
SMOKING, YOUR RISK GOES DOWN. IF YOU ARE SMOKING CIGARETTES
THAT HAVE THESE COMPOUNDS REMOVED, YOUR RISK GOES DOWN.
HE TOLD US ABOUT THE USE OF FERTILIZERS WITH LESS
NITRATES THAT WOULD REDUCE THE NITROUS OXIDE. HE TOLD US
ABOUT SCREENING FERTILIZER FOR THE ISOTOPES. HE TOLD US
ABOUT THE AIR-CURING OF THE TOBACCO COMPANIES.
HE SAID THERE WERE TOBACCOS THAT EXISTED THAT HAD
VIRTUALLY NO TSNA, TOBACCO-SPECIFIC NITROSAMINES, THAT THEY
COULD USE STRAINS HIGH IN CELLULOSE THAT WAS NOT DANGEROUS.
THEY COULD USE STRAINS OF TOBACCOS THAT DID NOT COLLECT
CONCENTRATE OR COLLECT NITRATES OR HEAVY METALS. AND DID
THINK DO THAT? NO.
HE SAID THEY COULD USE ADDITIONAL SELECTIVE
FILTERS THAT WOULD TAKE OUT PAH AND ALDEHYDES. THEY COULD
INCREASE THE FILTER -- THEY COULD INCREASE FILTER
EFFICIENCY. THEY COULD PUT VENTILATION HOLES AT THE TOBACCO
END OF THE FILTER, TO GIVE MORE OF AN AIR SWEEP THROUGH AND
REDUCE THE TAR AND NICOTINE THAT WENT INTO THE MOUTH.
AND HE TOLD YOU THAT REDUCING THE CARCINOGENS WAS
5406
BEING WORKED ON WHEN HE WAS AT PHILIP MORRIS, BECAUSE THE
IDEA WAS THAT IF YOU REDUCE THE CARCINOGENS, IT WAS LIKE

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REDUCING THE NUMBER OF BULLETS FIRED AT SOMEBODY. FEWER BULLETS, LESS LIKELY TO BE HARMFUL.

AND THIS COULD HAVE ALL BEEN DONE IN THE LATE '70S AND THE EARLY '80S, WHILE HE WORKED AT PHILIP MORRIS.

AND HE TOLD US THAT TSNA WERE AMONG THE MOST DANGEROUS CARCINOGENS IN THOSE CIGARETTES.

LET ME JUST SAY THAT THERE MIGHT BE AN IDEA -- IT MIGHT EVEN BE SUGGESTED BY ARGUMENT, NOT DIRECTLY, THAT BECAUSE CIGARETTES ARE LAWFUL PRODUCTS, THAT SOME KIND OF DEFENSE TO A CIVIL CASE -- BECAUSE THIS IS NOT A CRIMINAL CASE. THIS IS A CIVIL CASE. AND IF YOU THINK ABOUT IT, PRODUCT LIABILITY CASES ARE ABOUT LAWFUL PRODUCTS MOST OF THE TIME, AUTOMOBILES, BABY CRIBS, MACHINERY USED IN HEAVY INDUSTRY OR USED AT HOME, ALL OF THOSE ARE LAWFUL PRODUCTS.

AND THE QUESTION HERE IS NOT WHETHER IT'S A LAWFUL PRODUCT, BUT WHETHER OR NOT UNDER THE RULES THE COURT HAS GIVEN YOU AND THE FACTS, THERE IS CIVIL LIABILITY. NEGLIGENT FAILURE TO WARN. AND THIS ONLY APPLIES BECAUSE OF FEDERAL LAW. AS YOU WERE TOLD IN THE INSTRUCTION, IT ONLY APPLIES BEFORE JULY 1, 1969.

NOW, DURING THAT TIME FRAME, THERE WAS ONLY ONE WARNING THAT WAS PUT ON THE CIGARETTE PACKAGES AND IT SAID: "CAUTION: CIGARETTES MAY BE HAZARDOUS TO YOUR HEALTH."

THINK OF THE PRODUCTS UNDERNEATH YOUR SINK IN THE KITCHEN, THE DEADLY ONES THAT WILL KILL YOU IF YOU GET THEM INTO YOUR MOUTH OR THROAT OR SWALLOW THEM OR INTO YOUR EYES

OR EVEN ONTO YOUR SKIN. THEY HAVE A SKULL AND CROSSBONES ON THEM. THEY TELL YOU FLAT OUT THESE ARE HIGH RISK, VERY DANGEROUS. THEY DON'T SAY: "CAUTION. THEY MAY BE HAZARDOUS."

IN 1966, WHEN THAT LABEL CAME OUT, THERE HAD BEEN NO WARNING, NOT ONE. AND YET, SINCE 1954 AND BEFORE, THEY KNEW THAT THEIR PRODUCT WAS CAUSING CANCER. AND CANCER NEVER APPEARED ON ANY LABEL UNTIL 1985. THERE WAS NO WARNING IN THIS TIME PERIOD I'M TALKING ABOUT ABOUT CANCER AT ALL.

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I'LL SAY THIS ABOUT THE SPEED WITH WHICH I'M GOING THROUGH HERE. AS FAST AS IT MAY SOUND, IT'S NOT FAST ENOUGH. BECAUSE OF TIME, WE CAN'T COVER EVERY SINGLE ITEM. WE RELY ON THE JURY TO RECALL COLLECTIVELY AND ASSIST EACH OTHER WITH THE EVIDENCE THAT APPLIES TO IN AND AROUND THESE THINGS I'M TALKING ABOUT, AND THE OTHER LAWYERS ARE TALKING ABOUT. BECAUSE THIS CAN ONLY BE THE BRIEFEST KIND OF STATEMENT.

ADDITIONALLY -- I THINK I MENTIONED THIS, SO I'LL GO ON. I WANT TO MAKE THIS COMMENT ABOUT WHAT THE EVIDENCE WAS.

YOU HEARD FROM THE DEFENDANTS, BECAUSE THEY DESCRIBED TO YOU WHAT I WOULD CALL A GROSSLY NEGLIGENT APPROACH TO THEIR DISCOVERY. THEY HAD A DANGEROUS, HIGHLY RISKY PRODUCT. AND WE CAN EQUATE IT WITH THE AUTOMOBILE INDUSTRY.

IMAGINE THAT A CAR, A PARTICULAR CAR HAS A TENDENCY. PERHAPS ONE IN THREE WOULD BLOW UP. THE CAR

5408

PEOPLE, OF COURSE, WOULD RECALL IT.

THE CIGARETTE PEOPLE DON'T RECALL CIGARETTES. THEY MAKE ANOTHER ONE. CAMEL MAKES CAMEL LIGHTS AND CAMEL 100 STARTING ABOUT 1977, NOT TOO LONG BEFORE LESLIE WHITELEY BEGAN TO SMOKE CAMEL, AND SOMETIME IN THE EARLY '80S. AND SHE SMOKED CAMELS UNTIL 1998.

AND THEY TOLD YOU THAT, IN THOSE CIGARETTES, THEY DIDN'T MAKE A SINGLE CHANGE FROM THE TIME THEY WERE ISSUED. AND THAT'S WHAT SHE WAS SMOKING. THEY KNEW THEY WERE EXTREMELY DANGEROUS AND THEY WERE DOING ALL KINDS OF RESEARCH YOU HEARD ABOUT, BUT THEY NEVER MADE A SINGLE CHANGE. THEY FAILED TO DO A SINGLE DESIGN CHANGE DESPITE WHAT THEY KNEW.

NOW, THEIR ANSWER IS NOT TO REDESIGN THE CIGARETTE, THE CAMEL LIGHT OR THE 100. THEY LEFT THEM OUT THERE FOR LESLIE WHITELEY TO SMOKE. THEY MADE AN ULTRALIGHT, AND THAT TURNED OUT NOT TO BE SAFE EITHER.

AND THEY MADE THE PREMIER. WE ARE TOLD THAT WASN'T A SAFE CIGARETTE EITHER. AND NOW THEY ARE MAKING THE ECLIPSE, AND THAT WE ARE TOLD IT DOESN'T TURN OUT TO BE SAFE EITHER.

SO THIS IS A VERY NEGLIGENT AND VERY

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STRANGE
23 SYSTEM. YOU HAVE A DANGEROUS PRODUCT, YOU LEAVE IT
OUT
24 THERE, YOU MAKE ANOTHER ONE, WITH SOME INDICATION IT'S
NOT
25 DANGEROUS. IT TURNS OUT, IT'S AS DANGEROUS. "IF YOU
DON'T
26 LIKE THAT, WE'LL MAKE ANOTHER ONE."
27 I'M GOING TO TALK ABOUT CAUSATION. THE
CAUSATION
28 INSTRUCTIONS ARE FOUND ON PAGES 67, 68 AND 69 OF THE
5409
1 INSTRUCTIONS.
2 AND THERE ARE TWO IMPORTANT THINGS THAT I
WANT TO
3 BRING OUT OF THOSE INSTRUCTIONS. I JUST DON'T HAVE
TIME TO
4 PUT THEM UP. I'M NOT SURE YOU COULD READ THEM ANYWAY.
5 THESE, OF COURSE, ARE CAUSATION THAT APPLY
TO ALL
6 OF THE PLAINTIFFS' CLAIMS. IT STARTS OFF SAYING THAT:
7 "A CAUSE OF INJURY, DAMAGE, LOSS OR HARM IS
8 SOMETHING THAT IS A SUBSTANTIAL FACTOR IN
9 BRINGING ABOUT AN INJURY, DAMAGE, LOSS OR
HARM."
10 THE EVIDENCE IN THIS CASE HAS BEEN
OVERWHELMING
11 THAT AT LEAST ONE CAUSE OF THIS LUNG CANCER, ONE
SUBSTANTIAL
12 FACTOR OF PERHAPS MORE THAN ONE, IS SMOKING
CIGARETTES.
13 WHAT'S THE EVIDENCE BEEN ON THAT? DRS.
BURNS,
14 BENOWITZ, DR. DAVIS, DR. WARREN AND THE EPIDEMIOLOGIST
ALLAN
15 SMITH HAVE ALL TOLD YOU THAT.
16 THOSE FIRST, DAVIS, BURNS AND BENOWITZ,
THOSE ARE
17 THE PUBLIC HEALTH SPECIALISTS THAT HAVE BEEN INVOLVED
IN --
18 WITH THE SURGEON GENERAL FOR A LONG TIME. THEY'RE AT
THE
19 HEIGHT OF RESPECT AND EXPERIENCE IN THIS FIELD. AND
THEY'VE
20 ALL TOLD YOU THAT.
21 THERE'S ONLY ONE EPIDEMIOLOGIST WHO
TESTIFIED
22 HERE, AND THAT WAS ALLAN SMITH, DR. SMITH. AND HE
TOLD YOU
23 THAT.
24 SO VERY CLEARLY, A CAUSE OF THIS LUNG
CANCER IS
25 THAT SMOKING. DR. BURNS TOLD IT THIS WAY: "CAN YOU
IMAGINE
26 25 YEARS, ON THE AVERAGE OF 20 CIGARETTES A PACK,
SWEEPING
27 CARCINOGENS ACROSS THE LUNG ON A DAILY BASIS?" IT'S A
28 DOSE/RESPONSE.
5410
1 WE KNOW THAT 90 PERCENT OF LUNG CANCER
COMES FROM
2 SMOKING. AND SHE SITS RIGHT IN THE MIDDLE OF THAT
GROUP.

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I WOULD SUGGEST TO YOU THERE CANNOT BE ANY LEGITIMATE DEFENSE THAT AT LEAST ONE -- THAT SMOKING WAS AT LEAST ONE CAUSE OF THIS LUNG CANCER.

NOW, THERE'S OTHER INSTRUCTIONS HERE THAT ARE IMPORTANT, BECAUSE THERE CAN BE MORE THAN ONE SUBSTANTIAL CAUSE -- SUBSTANTIAL FACTOR. IT DOESN'T MEAN THE CAUSE. IT MEANS A CAUSE.

AND THERE CAN BE MANY, MANY SUBSTANTIAL FACTORS THAT CONTRIBUTE TO LUNG CANCER IN THEORY. YOU HAVE TO LOOK THROUGH TO SEE WHAT THEY MIGHT HAVE BEEN. SOME OF THEM, I WILL TELL YOU IN A MINUTE, DON'T COUNT FOR REASONS THAT ARE A MATTER OF THE WAY THIS CASE HAS BEEN STRUCTURED.

"THERE MAY BE MORE THAN ONE CAUSE OF AN INJURY.

WHEN NEGLIGENT OR WRONGFUL CONDUCT OF TWO OR MORE PERSONS OR NEGLIGENT OR WRONGFUL CONDUCT AND A DEFECTIVE PRODUCT CONTRIBUTE CONCURRENTLY AS CAUSES OF AN INJURY, THE CONDUCT OF EACH IS A CAUSE OF THE INJURY REGARDLESS OF THE EXTENT TO WHICH" IT CAUSES THE LUNG CANCER.

WHETHER IT'S JUST A LITTLE BIT OR IT'S HUGE, THEY ARE CONCURRENT CAUSES. AND HERE IS SOMETHING THAT'S CRITICAL:

"IT IS NO DEFENSE THAT THE NEGLIGENT OR WRONGFUL CONDUCT OF A PERSON NOT JOINED AS A PARTY WAS ALSO A CAUSE OF THE INJURY."

I WANT TO MAKE SOMETHING VERY CLEAR TO YOU, AND

5411

THAT IN THIS NEGLIGENCE CLAIM -- NOT IN THE FRAUD CLAIM, WHERE RELIANCE IS AN ISSUE. NOT IN THE FRAUD CLAIM, BUT GENERAL KNOWLEDGE. YOU PROBABLY HEARD MORE THAN YOU WANTED TO HEAR ABOUT THAT AS AN ISSUE.

BUT IN THIS NEGLIGENCE CAUSE OF ACTION, THERE IS NO CLAIM THAT THE PLAINTIFF WAS NEGLIGENT. THERE IS NO CLAIM AND THERE IS NO WAY FOR THE JURY TO DETERMINE THAT THE CAUSATION OF THIS CASE OF THIS LUNG CANCER WAS LESLIE WHITELEY'S. HER FREEDOM OF CHOICE, HER DECISION TO SMOKE, WHETHER IT WAS WISE OR NOT, IS NOT AN ISSUE IN THIS PART OF

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11 THE CASE, IN THE NEGLIGENCE PART OF THE CASE.
12 FINALLY, ONCE YOU DISCOVER THAT LUNG CANCER
IS --
13 EXCUSE ME -- THAT SMOKING IS A CAUSE OF THE LUNG
CANCER,
14 THEN YOU GO TO THE INSTRUCTION ON 69, PAGE 69, WHICH
SAYS,
15 ONCE YOU HAVE DONE THAT:
16 "THEN PLAINTIFFS CAN MEET THE BURDEN OF
PROVING
17 THAT EXPOSURE TO THE PRODUCTS OF PHILIP
MORRIS OR
18 R.J. REYNOLDS WAS A SUBSTANTIAL FACTOR IN
CAUSING
19 HER LUNG CANCER BY SHOWING THAT IN
REASONABLE
20 MEDICAL PROBABILITY THOSE PRODUCTS WERE A
21 SUBSTANTIAL FACTOR CONTRIBUTING TO THE RISK
--
22 CONTRIBUTING TO PLAINTIFF LESLIE WHITELEY'S
RISK
23 OF DEVELOPING LUNG CANCER."
24 ON CAUSATION, I DIDN'T MENTION ONE DOCTOR,
25 BECAUSE ASBESTOS IS A CAUSATION ISSUE HERE. AND ONE
DOCTOR
26 CAME IN. IT WAS DR. CHER FROM THE DEFENSE. AND HE
DIDN'T
27 TESTIFY ABOUT LESLIE WHITELEY, WHICH I FOUND MOST
INTRIGUING
28 AND MOST SURPRISING.
5412
1 ONE DEFENSE MEDICAL DOCTOR FROM ASBESTOS.
AND HE
2 TESTIFIES ABOUT, IN GENERAL, IN HIS OPINION, NO AMOUNT
OF
3 HOME EXPOSURE CAN EVER CAUSE LUNG CANCER.
4 ALLAN SMITH DISAGREED. DR. HORN, LOOKING
5 SPECIFICALLY AT THIS CASE THAT WE PUT ON,
NOTWITHSTANDING
6 HIS OPINION WAS CONTRARY TO OUR VIEW, TESTIFIED IT WAS
A
7 CLOSE CALL, BUT HE COULDN'T MAKE IT. HE COULDN'T GO
ACROSS
8 THE LINE. SO THAT'S THE STATE OF THE EVIDENCE.
9 YOU HAVE IN DR. CHER A VERY YOUNG AND
10 INEXPERIENCED DOCTOR WHO DID NOT LOOK AT THE
PLAINTIFF'S
11 CASE, NOT THE PLAINTIFF OR THE SITUATION.
12 AND HE SAID NEVER. IN THE MEDICAL SCIENCE,
13 NEVER -- LIKE A LOT OF PLACES, NEVER SAY NEVER,
BECAUSE IF
14 YOU DON'T LOOK AT THE FACTS, MAYBE YOU'RE NOT GOING TO
SEE
15 WHAT THE REAL CAUSATION IS.
16 DR. TASHKIN WAS THE OTHER AND ONLY OTHER
DEFENSE
17 DOCTOR WHO TESTIFIED ON CAUSATION. AND DR. TASHKIN
HAD A
18 MOST REMARKABLE SIMILARITY AND DISSIMILARITY TO DR.
SMITH.
19 DR. SMITH AND DR. TASHKIN BOTH AGREED THAT
MANY
20 OF THE SAME CARCINOGENS THAT ARE FOUND IN MARIJUANA

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ARE
21 FOUND IN TOBACCO.
22 AND DR. SMITH SAID, "YOU KNOW, IF THE SAME
23 CARCINOGENS ARE IN MARIJUANA AS THEY ARE IN TOBACCO, I
GUESS
24 IT WOULD MAKE SENSE THAT THEY'D MAKE SOME
CONTRIBUTION."
25 NOW, THAT DOESN'T TAKE A ROCKET SCIENTIST.
IF
26 YOU'VE GOT THE SAME CANCER-CAUSING PRODUCTS HERE AND
THE
27 SAME ONES OVER HERE (INDICATING), THEY ARE BOTH GOING
INTO
28 THE LUNG AND THERE'S LUNG CANCER, YOU WOULD ASSUME
THAT THEY
5413
1 MADE SOME CONTRIBUTION.
2 AND THE CONTRIBUTION THEY MAKE WILL
CERTAINLY
3 HAVE SOMETHING TO DO WITH HOW MUCH WAS BEING SMOKED.
AND SO
4 YOU CAN COMPARE 25 YEARS OF A PACK A DAY WITH WHATEVER
THE
5 SMOKING OF THE MARIJUANA WAS.
6 AND WE KNOW FROM DEAN MOORE, THE FIRST
HUSBAND OF
7 LESLIE WHITELEY, IT WAS ABOUT 20 TIMES IN FOUR YEARS.
AND
8 WE KNOW FROM THE PRESENT HUSBAND LEONARD, HE SAW HER
DO IT
9 TWICE. AND WE DON'T KNOW FROM WITNESSES WHAT WAS DONE
IN
10 THE PERIOD OF TIME WHEN SHE WAS MARRIED TO HER SECOND
11 HUSBAND.
12 WHAT WE HAVE IS MEDICAL RECORDS THAT SAY
"HEAVY
13 AND EXTENSIVE," WHICH I SUBMIT DR. TASHKIN MADE A WILD
GUESS
14 AND DECIDED IT HAD TO BE AT LEAST ONE JOINT A DAY.
15 ALL RIGHT. LET'S TAKE ONE JOINT A DAY.
YOU
16 COMPARE ONE JOINT A DAY OF MARIJUANA OVER THAT THREE
OR
17 FOUR-YEAR PERIOD TO 25 YEARS OF ONE PACK OR TO 20
CIGARETTE
18 JOINTS A DAY. THERE'S A DIFFERENCE.
19 BUT TO GET TO THE MOST INCREDIBLE EXPERT
20 TESTIMONY THAT I CAN IMAGINE, DR. TASHKIN DECIDES THAT
EVEN
21 THOUGH A VERY SMALL AMOUNT OF THESE CARCINOGENS FROM
THE
22 MARIJUANA ARE GETTING INTO HER LUNG AND THE VERY SAME
KIND
23 OF CARCINOGENS FROM THE CIGARETTES ARE GETTING INTO
HER LUNG
24 IN HUGE AMOUNTS, MARIJUANA CAUSED IT, NOT THE SMOKING.
25 THE EXPERT INSTRUCTION, WHICH I DON'T HAVE
TIME
26 TO GO THROUGH AT THIS POINT, TELLS YOU TO LOOK
CAREFULLY AT
27 THE BASIS OF AN EXPERT'S OPINION, AND IF THE BASIS IS
NUTS,
28 REJECT IT. AND I WOULD SUGGEST THAT COMES AS CLOSE TO

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MY
5414
EVER CALLING AN EXPERT'S OPINION NUTS.
ALL RIGHT. INCIDENTALLY, CAUSATION OF LUNG CANCER BY MARIJUANA AT ALL IS INTERESTING FROM DR. TASHKIN, WHO IS CLEARLY A LEADING EXPERT ON -- IN THAT FIELD. HE'S DONE A TREMENDOUS AMOUNT OF RESEARCH.
AND HE TOLD YOU HE'S FOUND PHYSIOLOGICAL CHANGES AND HE TOLD YOU MARIJUANA IS VERY BAD FOR LUNGS. AND HE TOLD YOU IT MAY WELL CAUSE LUNG CANCER -- AND IT MAY WELL --
BUT HE ALSO TOLD YOU THAT THEY NEEDED A STUDY TO MAKE THAT
-- COME TO THAT CONCLUSION. AND HE'S DOING THE STUDIES AND
HE JUST STARTED LAST YEAR. THEY DON'T HAVE THE RESULTS
YET.
NOW, I'M GOING TO DO A LITTLE DRAWING HERE (DRAWING ON BOARD). WHEN YOU DISCUSS AND ASSIGN OR DETERMINE WHAT THE CAUSE OF THIS LUNG CANCER IS, THERE'S
SOME THINGS THAT YOU CAN DO. THEN YOU HAVE TO TRANSLATE
INTO WHAT THE INSTRUCTIONS TELL YOU YOU HAVE TO DO.
FOR EXAMPLE, YOU COULD SAY "SMOKING" MEANS CIGARETTES. YOU COULD SAY ASBESTOS. YOU COULD SAY OTHER
ASBESTOS. YOU COULD SAY, WELL, MARIJUANA. YOU COULD SAY
LESLIE WHITELEY. YOU COULD SAY ALL OF THOSE THINGS SOMEHOW
CONTRIBUTED.
BUT THERE'S ONLY ONE OF THESE -- OR TWO OF THESE
OTHERS THAT COUNT. THAT'S SMOKING AND ASBESTOS. BECAUSE
WHEN YOU GET TO PAGE 30 ON THE SPECIAL VERDICT, WHICH IS
WHERE YOU ASSIGN THE FAULT WHICH CAUSED THIS LUNG CANCER,
YOU ONLY HAVE FOUR CHOICES. ONE IS -- ONE IS THE TOBACCO
COMPANY, ONE IS ANOTHER TOBACCO COMPANY, ONE IS METALCLAD,
5415
AND ONE IS OTHER ASBESTOS.
YOU WON'T SEE LESLIE WHITELEY'S NAME ON THERE.
AND YOU WON'T SEE MARIJUANA ON THERE, BECAUSE, AS I HAVE
TOLD YOU, AT LEAST IN THE NEGLIGENCE AREA, BUT IN ANY CASE,
IN THE ENTIRE CASE, THE ONLY WAY THAT YOU CAN FIND A
CAUSATION AND ASSESS CAUSATION ON THAT PAGE 30 IS BETWEEN
THE TWO TOBACCO COMPANIES, THE ASBSESTOS COMPANY AND OTHER
ASBESTOS PRODUCTS TO WHICH WE KNOW SHE WAS EXPOSED FOR

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ABOUT
 9   10 YEARS WHILE SHE WAS BEING EXPOSED TO TWO.
10   I'M NOT GOING TO HAVE THE TIME TO GO INTO
THAT
11   TESTIMONY, BUT YOU'VE HEARD IT.
12   BUT I THINK IT'S IMPORTANT TO TELL YOU
LESLIE
13   WHITELEY IS NOT ON TRIAL HERE. AND NO ONE IN THIS
CASE, NO
14   DEFENDANT HAS CLAIMED HER NEGLIGENCE CAUSED -- HER
15   NEGLIGENCE DECIDING TO SMOKE CAUSED THIS LUNG CANCER.
 THAT
16   ISSUE HAS NOT BEEN PUT BEFORE YOU BY THE DEFENDANTS.
HER
17   NEGLIGENCE IS NOT AN ISSUE.
18   IN TERMS OF NEGLIGENCE, THERE'S ONLY ONE
19   QUESTION. WERE THE CIGARETTE COMPANIES NEGLIGENT?
WAS THE
20   ASBSESTOS A CAUSE AND DID IT BELONG TO METALCLAD?
WHICH
21   YOU'LL PROBABLY HEAR A LOT FROM MR. ROSSE, BUT I JUST
DON'T
22   HAVE TIME TO MEET IT HERE IN THE BEGINNING. ALL
RIGHT.
23   ONE OF THE THINGS THAT YOU CAN DO ON THAT
PAGE 30
24   IS, ASBESTOS COULD BE PUT IN AT A FRACTION, A HALF A
25   PERCENT. YOU COULD DECIDE HOW TO DIVIDE BETWEEN THE
TWO
26   TOBACCOS COMPANIES. YOU COULD PUT ANOTHER HALF A
PERCENT OR
27   5 PERCENT OR WHATEVER YOU WANTED TO UNDER THE
ASBSESTOS.
28   BUT NOTHING SHOULD GO DOWN THERE FOR LESLIE WHITELEY.
5416
 1   YOU HAVE TO ASK: WHY WAS MARIJUANA -- WHY
WERE
 2   ALL THOSE OTHER DRUGS BROUGHT INTO THIS CASE? I WILL
TELL
 3   YOU. TO EMBARRASS LESLIE WHITELEY, TO MAKE YOU THINK
THAT
 4   BECAUSE SHE USED THOSE DRUGS, SHE IS A BAD PERSON.
AND BAD
 5   PEOPLE SHOULDN'T BE ABLE TO RECOVER FROM TOBACCO
COMPANIES,
 6   WHO HAVE MADE CIGARETTES THAT KILL HUNDREDS OF
THOUSANDS OF
 7   PEOPLE, EVEN IF THOSE TOBACCO COMPANIES FIT INTO THE
 8   INSTRUCTIONS AND THE FACTS THAT YOU HAVE TO DETERMINE
HERE.
 9   IT WAS A DISTRACTION. IT WAS IRRELEVANT.
IT HAD
10   NOTHING TO DO WITH IT, BECAUSE, AS YOU CAN SEE, EVEN
11   MARIJUANA OR ANY OTHER DRUG WOULD BE UP THERE.
12   AND SO THEY DID, IN THIS TRIAL, DISTRACT,
POINT
13   THEIR FINGERS AT EVERY CAUSE KNOWN TO MAN EXCEPT
SMOKING.
14   AND THAT'S EXACTLY WHAT THEY HAVE BEEN
DOING FOR
15   50 YEARS. AND I WOULD SUGGEST THAT MAYBE NOW IS THE
TIME TO
16   STOP IT AND MAKE THEM FACE UP TO THAT QUESTION.

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"DID YOUR COMPANIES KNOW THAT ASBESTOS -- EXCUSE ME -- THAT SMOKING WAS CAUSING LUNG CANCER IN 1954? OR AT ANY TIME THEREAFTER RIGHT DOWN TO FIVE MINUTES AGO?"

MY PREDICTION, THEY WON'T ANSWER IT.

THANK YOU VERY MUCH.

THE COURT: WHO IS ARGUING NEXT?

MS. CHABER: I AM.

THE COURT: MS. CHABER.

MS. CHABER: JUST FOR TIMING PURPOSES, ARE WE STOPPING AT NOON.

THE COURT: YES.

MR. BROWN: YOU CAN PICK IT.

5417

THE COURT: I'D ACTUALLY LIKE TO STOP A LITTLE BEFORE NOON, ABOUT 10 TO 12:00.

MS. CHABER: OKAY. I JUST WANTED TO KNOW WHERE I WAS AT.

CLOSING ARGUMENT BY MS. CHABER

MS. CHABER: AT THE BEGINNING OF THIS CASE, I TOLD YOU THAT THIS WAS A CASE ABOUT SELLING DEATH, ABOUT CANCER BY THE CARTON. IT JUST COINCIDENTALLY HAPPENED TO BE THE NAME OF THE READER'S DIGEST ARTICLE THAT CAME OUT IN 1953. AND THIS IS ABOUT SELLING DEATH, BECAUSE THAT IS WHAT THE DEFENDANTS DO, AND THEY DO IT LEGALLY.

BUT THAT'S NOT WHY YOU'RE HERE. YOU'RE NOT HERE TO PUT THEM IN JAIL. YOU'RE NOT HERE TO STOP THE MANUFACTURE OF CIGARETTES. YOU'RE HERE TO DECIDE WHETHER THEY SHOULD BEAR A RESPONSIBILITY FOR THE HARM THAT THEY CAUSE, FOR THE HARM THAT WAS CAUSED TO LESLIE WHITELEY, WHETHER THEY SHOULD SHARE IN THAT RESPONSIBILITY.

THEY WOULD LIKE TO PUT IT ALL ON LESLIE. "IT'S ALL HER FAULT. AND IT'S ALL HER FAULT," THEY SAY, EVEN THOUGH THERE WILL BE NO FINDING, AS MR. BROWN SAID, THAT SHE WAS NEGLIGENT. IT'S ALL HER FAULT, BECAUSE SHE WAS FOOLISH ENOUGH TO BELIEVE THEM, TO BELIEVE THE PROPAGANDA. AND THAT IS WHAT IT HAS BEEN. IT HAS BEEN NOTHING BUT PROPAGANDA.

AND WHEN I ASKED DR. HOFF -- YOU RECALL SHE CAME IN TO TALK ABOUT COMMON KNOWLEDGE. "EVERYBODY KNOWS. EVERYBODY KNOWS. EVERYBODY KNOWS." BUT, YOU KNOW, SHE NEVER LOOKED AT A SINGLE TOBACCO COMPANY DOCUMENT.

5418

AND YOU KNOW WHY? SHE DIDN'T LOOK AT THOSE BECAUSE SHE DIDN'T WANT TO KNOW THAT DURING THE SAME TIME THAT EVERYBODY WAS GETTING MESSAGES FROM THE PUBLIC HEALTH COMMUNITY, THERE WAS TWICE AS MANY, THREE TIMES AS MANY,

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FOUR TIMES AS MANY, AN AVALANCHE OF MESSAGES FROM THE TOBACCO COMPANIES THAT, "IT HASN'T BEEN PROVEN. IT HASN'T BEEN PROVEN. IT'S A CONTROVERSY. AND DON'T WORRY. WE HAVE TAKEN IT UPON OURSELVES TO FIND OUT THE TRUTH, TO FIND OUT THE ANSWER, TO FIGURE OUT WHETHER OR NOT CIGARETTE SMOKING CAUSES LUNG CANCER. AND AS LONG AS WE DON'T KNOW THE MECHANISM, THE WAY IT HAPPENS, WE CAN KEEP TELLING YOU IT'S OKAY TO BUY THE CIGARETTES, BECAUSE IT HASN'T BEEN PROVEN. IT HASN'T BEEN PROVEN." AND THAT'S WHAT LESLIE WHITELEY BELIEVED.

NOW WE'RE STANDING HERE IN 1999 (SIC). AND I KNOW THAT YOU'RE SKEPTICAL. WHY CAN SOMEBODY BELIEVE THAT?

BUT IT'S LESLIE WHITELEY'S STATE OF MIND AT THE TIME, AT THE TIMES THAT THE EVENTS HAPPENED, AND NOT WHAT YOUR MEMORY IS OF WHAT YOU BELIEVED AT DIFFERENT POINTS IN TIME.

AND THE QUESTION IS: HAVE THE DEFENDANTS MADE MISLEADING STATEMENTS? HAVE THEY DONE SO FOR ONE PURPOSE AND ONE PURPOSE ONLY?

AND AFTER LUNCH, I'LL SHOW YOU SOME OF THE DOCUMENTS THAT SHOW EXACTLY WHAT THESE MISLEADING STATEMENTS ARE. THEY'RE NOT JUST MISLEADING STATEMENTS. THEY'RE NOT TOTALLY 100 PERCENT.

THEY NEVER COME OUT QUITE AND SAY, "YES, WE

5419

TESTED OUR MARLBORO CIGARETTE AND WE TESTED OUR CAMEL CIGARETTE AND THEY ARE SAFE."

THEY NEVER COME OUT AND MAKE THAT FIRM REPRESENTATION, WHICH WE, OF COURSE, KNOW WOULDN'T BE TRUE AND THEY KNOW IT WOULDN'T BE TRUE. BUT WHAT THEY DO IS THEY MISLEAD BY HALF-TRUTHS, BY TELLING HALF-TRUTHS.

WHEN YOU SPEAK -- WHEN YOU TAKE IT UPON YOURSELF TO SPEAK AND YOU STAND IN THE SHOES OF A MANUFACTURER WHO HAS A RESPONSIBILITY TO BE THE EXPERT ABOUT THEIR PRODUCT THAT THEY SELL TO THE BUYER OF THE PRODUCT, WHEN YOU STAND IN THOSE SHOES AND YOU CHOOSE TO SPEAK, YOU HAVE TO TELL THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH.

AND WHAT THESE COMPANIES DID WAS THEY TOLD HALF-TRUTHS. AND IT WAS FOR THE PURPOSE OF CREATING DOUBT, CREATING DOUBT IN THE MINDS OF SMOKERS, GIVING SMOKERS THE RATIONALE TO BE ABLE TO CONTINUE SMOKING. THAT IS THE INTENT AND THAT IS THE PURPOSE AND THAT IS FRAUD.

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18 AND LESLIE WAS DEFRAUDED. AND THE BIGGEST
19 DEFENSE -- AND I WILL GO THROUGH THE ELEMENTS AGAIN AFTER
20 LUNCH OF HOW YOU GET TO ALL OF THESE PLACES -- BUT THEIR
21 BIGGEST DEFENSE IS "SHE WASN'T JUSTIFIED IN RELYING ON US.
22 EVERYBODY KNOWS WE'RE A BUNCH OF LIARS."
23 I MEAN, IS THAT REALLY WHAT THEY'RE SAYING? NO.
24 THEY MADE STATEMENTS. THE STATEMENTS WERE EITHER FALSE OR
25 MISLEADING OR HALF-TRUTHS, PARTIALLY TRUE.
26 AND YOU WILL SEE -- AND YOU WILL SEE AN
27 INSTRUCTION THAT SAYS THAT IF YOU INTEND TO DEFRAUD THE
28 PUBLIC AND THE PERSON YOU'RE TALKING ABOUT IS A MEMBER OF
5420
1 THAT CLASS OF PEOPLE WHO YOU INTEND TO DEFRAUD, THEN THEY'RE
2 DEFRAUDED.
3 SO THE QUESTION ISN'T: CAN LESLIE WHITELEY IN
4 HER TESTIMONY SAY "YES, I REMEMBER ON JANUARY 27TH, 1973,
5 WHEN I WAS 14 YEARS OLD, THAT I HEARD OR READ OR SAW THAT
6 THE TOBACCO COMPANIES SAID X, Y OR Z"? SHE CAN'T SAY THAT.
7 BUT I WILL SHOW YOU WHAT SHE DOES SAY AND WHAT
8 SHE BELIEVED. AND YOU KNOW WHAT? IT'S EXACTLY WHAT THEY
9 WANTED HER TO BELIEVE. THEY MADE THE STATEMENTS SO THAT SHE
10 AND OTHER SMOKERS WOULD BELIEVE THEM. THAT'S THE PURPOSE.
11 THAT'S THE INTENT.
12 AND WHEN WE GET TO EACH OF THE ELEMENTS OF EACH
13 OF THE DIFFERENT CAUSES OF ACTION THAT I'M GOING TO DEAL
14 WITH, FRAUD BY INTENTIONAL MISREPRESENTATION. AND I TOLD
15 YOU THOSE INTENTIONAL MISREPRESENTATIONS INCLUDE THOSE
16 HALF-TRUTHS, CONCEALMENT BEFORE JULY 1, 1969.
17 I KNOW IT MUST HAVE DRIVEN YOU CRAZY DURING THE
18 TRIAL THAT EVERY TIME WE HAD TO DEFINE THE TIME AND PUT THIS
19 MAGIC LINE HERE.
20 FEDERAL LAW PROTECTS THE DEFENDANTS ON A CLAIM OF
21 CONCEALMENT POST-JULY 1, 1969, BUT NOT BEFORE THEN. AND SO
22 YOU MIGHT SAY TO YOURSELF, "SO WHO CARES? LESLIE WHITELEY
23 DIDN'T START SMOKING UNTIL 1972."
24 BUT I WANT YOU TO THINK ABOUT THIS. WE ARE NOT
25 BORN INTO THIS WORLD SMOKING CIGARETTES. WE DO NOT COME

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FROM THE WOMB AND LIGHT UP AND SMOKE. WE ARE AFFECTED BY
EVERYTHING IN OUR SURROUNDINGS. WE ARE AFFECTED BY
ADVERTISING. WE ARE AFFECTED BY TELEVISION. WE ARE
5421
AFFECTED BY THE PEOPLE WHO LIVE AROUND US. WE ARE AFFECTED
BY THE PEOPLE WE KNOW. AND WE ARE AFFECTED BY THE PEOPLE WE
DON'T KNOW.
AND ONE THING THAT WE DO KNOW, DURING THIS TIME
PERIOD WHEN YOU HEAR PEOPLE TALK ABOUT CHILDREN AND GROWING
UP AND THE FORMATIVE YEARS, WELL, TEENAGEHOOD (SIC) IS NOT
USUALLY CONSIDERED THE FORMATIVE YEARS. IT'S KIND OF
CONSIDERED THE CULMINATION OF THOSE FORMATIVE YEARS. THEN
YOU'VE GOT TO LIVE WITH WHAT YOU'VE GOT TO LIVE WITH, THE
TEENAGER.
WE'LL TALK ABOUT THAT IN A FEW MINUTES. BUT THE
FORMATIVE YEARS ARE WHEN THEY'RE YOUNG, WHEN THEY'RE GROWING
UP, WHEN THE WORLD IS SOMETHING NEW, WHEN THE WORLD IS
SOMETHING TO BE LOOKED AT BUT NOT EXAMINED WITH THE BRAINS
AND THE INTELLIGENCE OF A GROWN-UP AND AN ADULT.
AND SO WHAT DO WE GROW UP WITH? WHAT DID LESLIE
GROW UP WITH IN THE 1960S? SHE GREW UP WITH TELEVISION.
SHE GREW UP WITH THERE BEING COMMERCIALS FOR CIGARETTES
CONSTANTLY ON TV.
WE LOOKED AT JUST A BLOCK OF TIME IN ONE YEAR AND
ON THE FEW STATIONS THAT WERE AVAILABLE. AND ANYTIME YOU
TURNED A CHANNEL -- I GUESS WE DIDN'T HAVE CLICKERS THEN TO
DO IT -- ANYTIME YOU TURNED THE CHANNEL OR ONE MEMBER OF THE
FAMILY WANTED TO WATCH THIS SHOW AND ANOTHER MEMBER OF THE
FAMILY WANTED TO WATCH THE NEXT SHOW, THERE WAS A CIGARETTE
COMMERCIAL, A CIGARETTE COMMERCIAL WITHOUT A WARNING, AND A
CIGARETTE COMMERCIAL THAT MADE IT LOOK LIKE IT WAS A
WONDERFUL THING TO DO.
5422
SPRINGTIME FRESH, OUT IN THE GREAT OUTDOORS,
CLIMB MOUNTAINS, OUT ON THE BEACH. LOVELY SCENES, HEALTHY
PEOPLE.
THERE WERE NO SCENES OF PEOPLE WITH OXYGEN ON
BECAUSE THEY HAD SUCH SEVERE EMPHYSEMA THAT THEY CAN'T
BREATHE WITHOUT IT. THERE WAS NO MENTION OF THAT.

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THE ONLY
MENTION AT ALL WAS WHAT A WONDERFUL THING.
YOU SAW A COUPLE OF THE COMMERCIALS, AND YOU
REMEMBER LUCILLE BALL LIGHTING DESI ARNAZ' CIGARETTE? AND
YOU KNOW THE COMMENT? "OH, THANK YOU, LUCY," LIKE "THAT'S
THE BEST THING YOU COULD DO FOR ME IS TO GIVE ME MY
WONDERFUL CIGARETTE TO SMOKE."
AND WE SHOWED YOU ADS FROM DURING THIS TIME
PERIOD THAT HAD PRETTY GIFT-WRAPPED CHRISTMAS PACKAGES OF
CARTONS OF CIGARETTES. GIVE YOUR LOVED ONE A CARTON OF
CANCER. WAS THAT WHAT THEY WERE SAYING? NO. THEY WERE
SAYING, "HERE'S OUR PRODUCT. THIS IS OKAY."
AND WHEN LESLIE WAS GROWING UP, AND IN THAT TIME
PERIOD -- IT IS NOT LIKE TODAY. TODAY, YOU KNOW WHO SMOKES
CIGARETTES AND WHO DOESN'T SMOKE CIGARETTES. BECAUSE IF YOU
GO TO WORK WITH THOSE PEOPLE, YOU KNOW THAT THEY HAVE TO GO
DOWNSTAIRS ON A BREAK AND STAND OUTSIDE AND SMOKE. YOU KNOW
THEY CAN'T SMOKE IN A RESTAURANT. YOU KNOW ALL OF THE
LIMITATIONS THAT WE HAVE NOW.
BUT THAT WAS NOT TRUE FOR THE 1960S, WHEN LESLIE
WAS IN HER FORMATIVE YEARS, WHEN SHE WAS BECOMING THE
TEENAGER SHE WAS GOING TO BE, WHICH LED TO THE ADULT SHE WAS
GOING TO BE.
5423
YOU KNOW WHAT? DURING THIS TIME PERIOD, THERE IS
EVIDENCE. AND YOU WILL SEE THE DOCUMENTS. I WILL SHOW YOU
SOME. AND I WILL GIVE YOU A LIST OF NUMBERS OF OTHER ONES
THAT ARE SIMILAR AND JUST LIKE IT.
YOU WILL HAVE AN OPPORTUNITY WHEN YOU GO BACK
INTO THE JURY ROOM TO GET A COPY OF THESE INSTRUCTIONS, SO
DON'T WORRY IF YOU DIDN'T GET EVERYTHING DOWN. YOU'LL GET
COPIES OF THE SPECIAL VERDICT FORM.
AND I'M GOING TO SHOW YOU SOME PARTS OF IT AND
KIND OF HOW YOU WORK YOUR WAY THROUGH IT. AND YOU WILL GET
THE DOCUMENTS.
YOU KNOW, REMEMBER, WE KEPT MARKING DOCUMENTS.
AND AFTER A WHILE, THE COURT AND THE COUNSEL DECIDED IT
DIDN'T MAKE SENSE TO STAND IN FRONT OF YOU AND READ 100,
200, 300 NUMBERS OF DOCUMENTS. BUT THOSE ARE IN

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EVIDENCE.
AND THAT EVIDENCE WILL BE AVAILABLE TO YOU IN THE JURY ROOM. AND YOU WILL BE ABLE TO LOOK AND YOU WILL BE ABLE TO LOOK FOR YOURSELF.
YOU WILL BE ABLE TO SEE THAT, WHEN I TELL YOU THESE THINGS, I AM NOT TAKING THEM OUT OF CONTEXT. YOU WILL BE ABLE TO SEE FOR YOURSELF THAT THERE IS SUFFICIENT EVIDENCE.
AND I WANT TO TELL YOU ONE LAST THING BEFORE WE BREAK FOR LUNCH. THE PLAINTIFFS' BURDEN OF PROOF, EXCEPT FOR LATER ON, WHEN WE GET TO PUNITIVE DAMAGES -- AND I WILL EXPLAIN THAT -- IS BY A PREPONDERANCE OF THE EVIDENCE.
WE HAVE THREE STANDARDS OF EVIDENCE IN THE LAW. IN THE CRIMINAL LAW, IT'S BEYOND A REASONABLE DOUBT. WHEN
5424
WE GET TO THE PUNITIVES WE'LL BE IN THAT CLEAR AND CONVINCING EVIDENCE.
THE EVIDENCE ON ALL OF PLAINTIFFS' CAUSES OF ACTION, EXCEPT THE PUNITIVE DAMAGES, IS BY A PREPONDERANCE OF THE EVIDENCE, EVIDENCE WHICH HAS MORE CONVINCING FORCE AND WEIGHT THAN THAT OPPOSED TO IT.
AND I SUGGEST TO YOU THAT, WHEN IT COMES TO SMOKING BEING A CAUSE OF LESLIE WHITELEY'S CANCER, THE SCALES HAVE TIPPED SO FAR, WE ARE NOT EVEN JUST TALKING PREPONDERANCE.
BUT YOU DON'T HAVE TO GET THERE. YOU CAN WALK OUT OF THIS COURTROOM AT THE END OF THIS TRIAL WITH SOME DOUBT, BECAUSE YOU DO NOT HAVE TO HAVE THIS PROVEN TO YOU BEYOND A REASONABLE DOUBT.
YOU CAN WALK OUT AND HAVE A LITTLE BIT OF DOUBT. YOU'VE GOT TO GET PAST MORE CONVINCING FORCE THAN THAT OPPOSED TO IT.
AND I SUGGEST TO YOU, WHEN IT COMES TO SMOKING CAUSING LESLIE WHITELEY'S LUNG CANCER AND EVERYTHING THAT'S GOING TO FLOW FROM THAT LUNG CANCER, WHICH I'LL TALK ABOUT LATER, THE EVIDENCE IS OVERWHELMING.
AND EVEN IF, AS MR. BROWN SAID, YOU FIND THAT MARIJUANA IS A CAUSE, SMOKING IS A CAUSE. AND THAT'S THE QUESTION YOU'RE GOING TO BE ASKED. NOT, WAS MARIJUANA A CAUSE? WAS SMOKING A CAUSE, A SUBSTANTIAL CONTRIBUTING

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FACTOR? THAT'S THE QUESTION FOR YOU.
THIS MIGHT BE A GOOD TIME TO STOP, YOUR HONOR.
THE COURT: OKAY. JURORS, PLEASE CONTINUE TO
5425
FOLLOW THE ADMONITION. AS YOU KNOW, IT'S CRITICAL THAT YOU
DO THAT.
AND WE'LL SEE YOU BACK AT 1:30. HAVE A GOOD
LUNCH.
(LUNCH RECESS TAKEN AT 11:48 A.M.)

5426
AFTERNOON SESSION
1:30 P.M.
WEDNESDAY, MARCH 8, 2000
(THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS, OUTSIDE THE PRESENCE OF THE JURY)
THE COURT: WE ARE ON THE RECORD BECAUSE EVERYBODY HAS ASKED FOR THAT OPPORTUNITY, AND WE ARE OUTSIDE
THE PRESENCE OF THE JURY.
MR. ESCHER: YES, YOUR HONOR.
THE TOBACCO COMPANY DEFENDANTS ARE MOVING FOR A
MISTRIAL ON THE BASIS OF MR. BROWN'S INAPPROPRIATE ARGUMENT
IN HIS CLOSING. AND WE DO NOT THINK THAT IT'S CURABLE, NOR
DO WE THINK THAT A CURATIVE STATEMENT WOULD HELP IN THIS
CONTEXT.
IT WOULD JUST BE RE-RINGING THE BELL. AND SO WE
ARE MOVING FOR A MISTRIAL, YOUR HONOR.
THE COURT: DO YOU INTEND TO TELL THE RECORD
WHAT THE STATEMENT IS THAT YOU ARE REFERRING TO?
MR. ESCHER: I'LL HAVE TO PARAPHRASE IT,

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YOUR
HONOR, BUT IT'S THE ONE WHICH MR. BROWN INDICATED THAT THIS
WAS THE JURY'S OPPORTUNITY TO DO SOMETHING ABOUT THE HEALTH
CRISIS CAUSED BY CIGARETTE SMOKING.
THE COURT: LET ME SAY THIS TO YOU, AND I THINK
YOU JUST ANSWERED IT IN YOUR STATEMENT, BECAUSE YOU
ANTICIPATED IT.
THE QUESTION IS? DOES THE DEFENSE WANT ANY KIND
OF A CURATIVE INSTRUCTION OR OTHER AMELIORATION OF THE
SITUATION?
MR. HARDY: NO, YOUR HONOR.
5427
MR. FURR: NO, YOUR HONOR.
THE COURT: DO YOU WANT TO BE HEARD? DO YOU
WANT TO SUBMIT? DO YOU WANT TO BE HEARD ON THE MOTION?
MS. CHABER: DO YOU WANT TO BE HEARD ON YOUR
STATEMENT?
MR. BROWN: FIRST OF ALL, IT WAS OBJECTED TO
BEFORE I FINISHED THE SENTENCE AND THE OBJECTION WAS
SUSTAINED.
AND IT WAS NOT A LONG SPEECH. IT WAS LIKE A
SENTENCE. AND I THINK IT'S ALREADY CURED.
AND IT SEEMS TO ME, THERE ARE ALL KINDS OF
OPTIONS AND ALTERNATIVES TO CURING IT. AND TO SAY THAT AN
EIGHT-WEEK TRIAL IS PUT IN A POSITION FOR A MISTRIAL WHEN
THAT STATEMENT WAS OBJECTED TO PROMPTLY AND THERE WAS NO
ARGUMENT FROM ME, GOING STRAIGHT AHEAD, I THINK IS
INAPPROPRIATE. IT IS NOT PROPER.
MR. ESCHER: YOUR HONOR, IF I COULD RESPOND
BRIEFLY.
I DO BELIEVE MR. BROWN GOT HIS ENTIRE SENTENCE
OUT. THERE WAS AN OBJECTION. IT WAS SUSTAINED.
THE REASON WE ARE MOVING FOR A MISTRIAL IS
BECAUSE THE STATEMENT ITSELF IS HIGHLY INFLAMMATORY,
UNFAIRLY PREJUDICIAL TO THE DEFENDANTS, AND CLEARLY
IMPROPER.
MR. BROWN: I MIGHT ADD JUST ONE THING. I
WOULDN'T DARE TRY TO PARAPHRASE IT, BECAUSE I SAW HOW BADLY
IT WAS BUNGLED BY JOE ESCHER. BUT WHAT JOE ESCHER SAID THAT
I SAID IS NOT VERY CLOSE TO WHAT ACTUALLY WAS SAID.
5428
THE COURT: ACCORDING TO THE COURT'S
RECOLLECTION, YOU DID COMPLETE THE SENTENCE, MR. BROWN, AND
THE SENTENCE SAID THIS IN SUBSTANCE, AND I'M NOT QUOTING
VERBATIM, BUT IT'S CLOSE. I ACTUALLY WROTE THIS DOWN,

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BECAUSE WHEN THE OBJECTION WAS MADE, I AGREED WITH THE IMPROPRIETY OF THE ARGUMENT AND SO RULED IN FRONT OF THE JURY.

THE SENTENCE WAS, IN EFFECT: "THIS CASE IS GOING TO HAVE SOME KIND OF AN IMPACT, REGARDLESS OF HOW IT IS DECIDED, ON ONE OF THE MOST CRITICAL HEALTH CRISES THAT THE UNITED STATES AND PERHAPS THE WORLD HAS EVER SEEN." THAT WAS THE ESSENCE OF THE STATEMENT. THE COURT DOES AGREE THAT IT WAS AN IMPROPER STATEMENT FOR YOU TO MAKE.

I'M GOING TO DENY THE MOTION AT THIS POINT, WITHOUT PREJUDICE TO TAKING A LOOK AT IT WHEN AND IF THE ISSUE SHOULD BE RAISED ON A POST-TRIAL BASIS IN THE CONTEXT OF THE ENTIRE TRIAL.

AND AGAIN, I'M NOT EXPRESSING A VIEW. I'M NOT SUGGESTING SUCH A MOTION WOULD BE GRANTED. I'M NOT INVITING A MOTION. I'M JUST SAYING THAT THIS RULING IS WITHOUT PREJUDICE TO THE ISSUE BEING RAISED AGAIN, IF ANYBODY DEEMS IT APPROPRIATE.

MR. ESCHER: THANK YOU, YOUR HONOR.

MR. FURR: THANKS.

(THE FOLLOWING PROCEEDINGS WERE HELD IN THE COURTROOM, IN THE PRESENCE OF THE JURY, AT 1:40 P.M.)

THE COURT: GOOD AFTERNOON, EVERYBODY.

5429

MS. CHABER, YOU MAY PROCEED.

MS. CHABER: THANK YOU, YOUR HONOR.

CLOSING ARGUMENT MS. CHABER(CONTINUED)

MS. CHABER: BEFORE LUNCH, I HAD SAID TO YOU THAT THERE WAS A REASON AND ONE REASON ONLY THAT THE DEFENDANTS CONTINUE TO MAKE HALF-TRUTHS AND MISLEADING STATEMENTS, AND ONE OF THINGS I WANTED TO SAY ABOUT HALF-TRUTHS ARE THEY'RE VERY INTERESTING.

YOU KNOW, IF THEY TOLD A COMPLETE LIE, IT MIGHT BE HARDER FOR SOMEBODY TO BELIEVE. BUT IF YOU TELL A HALF-TRUTH THAT HAS SOME ASPECT OF TRUTH TO IT, BUT NOT QUITE ALL OF IT, IT'S EASIER FOR SOMEONE TO BELIEVE, PARTICULARLY SOMEONE WHO IS ADDICTED TO A PRODUCT THAT CONTAINS A SUBSTANCE THAT IS, WE'VE HEARD FROM THREE PEOPLE WHO ARE PURPORTEDLY THE HEALTH COMMUNITY THAT THE DEFENDANTS ARE COOPERATING WITH, DR. DAVIS, DR. BURNS, DR. BENOWITZ, AS ADDICTIVE AS COCAINE, HEROIN, HARD DRUGS, NICOTINE.

WE DON'T LIKE TO THINK THAT. WE DON'T LIKE TO

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THINK THAT IN SOCIETY BECAUSE, WHEN WE THINK OF ADDICTION,
WE THINK OF SOMETHING ILLEGAL, SOMETHING THAT'S A CRIME. AN
ADDICT, SOMEBODY WHO IS DOING SOMETHING IN A BACK ALLEY.
BUT NICOTINE IS AN ADDICTIVE DRUG, AND THAT IS
WHAT THE DEFENDANTS SELL.
I AM GOING TO SHOW YOU A DOCUMENT FROM MAY 1ST,
1972. IT IS DOCUMENT 330, 3-3-0. THIS IS THE YEAR THAT
LESLIE WHITELEY, AT THE AGE OF 13, BEGAN SMOKING.
IT'S A MEMORANDUM TO HORACE R. KORNEGAY, THE
5430
CHAIRMAN OF THE TOBACCO INSTITUTE. AND IT SPEAKS OF SOME
THINGS THAT I'M TRYING TO SAY TO YOU THAT FALL INTO THE
CATEGORY OF THESE HALF-TRUTHS, AND THE REASON FOR GIVING
THEM.
"IT IS MY STRONG BELIEF THAT WE NOW HAVE AN
OPPORTUNITY TO TAKE THE INITIATIVE IN THE
CIGARETTE CONTROVERSY, AND START TO TURN IT
AROUND."
FIRST OF ALL, 1972, WHAT CONTROVERSY IS THERE? I
THOUGHT IT WAS DECIDED IN 1964, WHEN LESLIE WHITELEY IS
SUPPOSED TO BELIEVE THIS COMPLETELY. WHAT CONTROVERSY?
SO WE ALREADY START OUT SAYING THERE'S A
CONTROVERSY. YOU KNOW, A CONTROVERSY MEANS THERE ARE TWO
SIDES TO IT. THERE ARE TWO SIDES, A CONTROVERSY.
"FOR NEARLY 20 YEARS, THIS INDUSTRY HAS EMPLOYED
A SINGLE STRATEGY" --
I'M NOT BLOCKING ANYONE? I CAN READ IT FROM
HERE.
" -- A SINGLE STRATEGY TO DEFEND ITSELF ON A
MAJOR FRONTS -- LITIGATION, POLITICS, AND PUBLIC
OPINION.
"WHILE THE STRATEGY WAS BRILLIANTLY CONCEIVED
AND EXECUTED OVER THE YEARS HELPING US WIN
IMPORTANT BATTLES, IT IS ONLY FAIR TO SAY THAT IT
IS NOT - NOR WAS IT INTENDED TO BE - A VEHICLE
FOR VICTORY. ON THE CONTRARY, IT HAS ALWAYS BEEN
A HOLDING STRATEGY, CONSISTING OF" -- AND HERE IS
THE REASON -- "CREATING DOUBT ABOUT THE HEALTH
5431

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CHARGE WITHOUT ACTUALLY DENYING IT."
THERE IS YOUR HALF-TRUTH. THERE IS YOUR HOOK FOR
THE SMOKER. THERE IS YOUR REASON TO BE ABLE TO SAY, "IT
CAN'T POSSIBLY BE TRUE THAT OUR GOVERNMENT WOULD ALLOW A
COMPANY TO SELL A PRODUCT THAT KILLED 300,000, 400,000,
ONE-IN-TWO SMOKERS. SO IT CAN'T BE THAT DANGEROUS."
CREATING DOUBT, AND AT THE SAME TIME:
"ADVOCATING THE PUBLIC'S RIGHT TO SMOKE, WITHOUT
ACTUALLY URGING THEM TO TAKE UP THE PRACTICE."
AND IN A FEW MINUTES, I WILL SHOW YOU HOW THEY
URGED AND LOOKED AT TEENAGERS, BECAUSE THOSE ARE THE PEOPLE
WHO START SMOKING. 40-YEAR-OLDS DO NOT START SMOKING AND
BECOME SMOKERS. KIDS DO. TEENS DO.
AND THEY ARE CAREFULLY STUDIED BY THIS INDUSTRY
BECAUSE THEY KNOW THAT 90 PERCENT OF ALL SMOKERS HAVE
STARTED WHILE THEY ARE BELOW THE AGE OF CONSENT, WHILE THEY
ARE MINORS.
AND THEN: "ENCOURAGING OBJECTIVE HEALTH RESEARCH
AS THE ONLY WAY TO RESOLVE THE QUESTION OF THE
HEALTH HAZARD."
SO YOU SAY TO PEOPLE: "THERE IS A CONTROVERSY.
AND, WE, THE TOBACCO INDUSTRY, WE CARE, AND WE'RE GOING TO
FIND OUT WHAT THE ANSWER IS."
AND WE'RE HERE NOW IN 2000. I WAS REMINDED THAT
I SAID 1999, BECAUSE I'M HAVING A HARD TIME MAKING THAT
SWITCH, BUT HERE WE ARE, HOW MANY YEARS LATER? AND THE SAME
QUESTIONS ARE BEING ASKED. THE SAME ISSUE IS BEING RAISED.
"WE STILL DON'T KNOW. WE THINK IT'S PROBABLY A
5432
RISK. IT'S NOT GOOD FOR YOU, BUT WE DON'T REALLY KNOW. AND
WE DON'T KNOW WHAT IT IS IN CIGARETTES. AND IF -- GOSH, IF
WE ONLY KNEW WHAT IT WAS IN CIGARETTES, WE'D TAKE IT OUT AND
THEN EVERYTHING WOULD BE JUST FINE."
THEY'RE STILL SAYING THAT. AND MAYBE THAT
CHANGED AS OF 1999. PHILIP MORRIS' WEBSITE, FOLLOWED THIS
YEAR BY R.J. REYNOLDS' WEBSITE, FINALLY ACKNOWLEDGING WHAT
THE MEDICAL COMMUNITY HAS SAID, WHAT WAS ESTABLISHED FACT.

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AND IF IT WAS SUCH AN ESTABLISHED FACT, ASK YOURSELF, "WHY WOULD WE HAVE NEEDED DR. WECKER, NOT A MEDICAL DOCTOR, WHO IS A STATISTICIAN, TO COME IN HERE AND TELL US THAT SMOKING REALLY ISN'T VERY MUCH OF A BIG CAUSE?"

"THERE'S ALL THESE OTHER THINGS. AND THAT ALL THESE STUDIES ARE FLAWED, BECAUSE THEY DIDN'T TAKE INTO ACCOUNT WHAT PEOPLE EAT, WHAT THEY DON'T EAT, WHETHER THEY EXERCISE."

WHY ARE WE HERE IN 2000, WITHOUT SOMEBODY COMING FORWARD AND SAYING -- SOME CORPORATE VICE PRESIDENT, THE CHAIRMAN OF THE BOARD, SOMEBODY SAYING FROM THAT WITNESS STAND, "YES, WE KNOW WE SELL A DEADLY PRODUCT. WE KNOW IT. WE ADMIT IT. WE ACKNOWLEDGE IT."

BECAUSE THE WEBSITE DOESN'T SAY THAT EITHER. IT SAYS: "REFER YOURSELF BACK TO THE HEALTH COMMUNITY"

BY THE WAY, WHEN DR. DAVIS WAS HERE AND DR. BURNS WAS HERE AND DR. BENOWITZ WERE HERE, THERE WAS AN ATTEMPT TO MAKE THEM OUT TO BE SOME KIND OF ZEALOTS, "OH, MY GOSH, THEY'RE ANTI-TOBACCO. THEY'RE ANTI-CIGARETTES. THEY'RE ZEALOTS. THEY WANT TO PUT US OUT OF BUSINESS."

5433

NO. THEY WANT TO KEEP PEOPLE FROM DYING. THEY WANT TO KEEP PEOPLE FROM DYING. THAT'S THEIR GOAL.

SO WHY DO WE HAVE ALL THIS QUESTIONING OF THEM AND ARGUING OVER EVERY POINT? IT'S NOT ADDICTIVE. IT IS ADDICTIVE. WHICH DEFINITION? "JUST ADMIT IT. YOU SELL A DEADLY PRODUCT. IT'S ADDICTIVE."

"WE'LL MAKE IT BETTER FOR SOME PEOPLE. WELL, WE ARE NOT SURE REALLY IF IT'S BETTER, BUT WE'LL TELL YOU THAT ULTRALIGHT HAS LESS OR A LIGHT HAS LESS."

SAME DOCUMENT: "ON THE PUBLIC OPINION FRONT, HOWEVER, OUR SITUATION HAS DETERIORATED" DESPITE THE MAJOR CONCESSIONS WE'VE MADE.

AND NOW, WHERE ARE THEY? THEY'RE AT A STRATEGIC IMPASSE.

"AS AN INDUSTRY, THEREFORE, WE ARE COMMITTED TO AN ILL-DEFINED MIDDLE GROUND WHICH IS ARTICULATED BY VARIATIONS ON THE THEME 'THAT THE CASE IS NOT PROVED.'"

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19 THERE IT IS. THAT'S THE HALF-TRUTH. "THE
CASE
20 IS NOT PROVED."
21 THEY GO ON TO SAY: "AS THE RECENT HISTORY
OF THE
22 U.S. INVOLVEMENT IN VIETNAM DEMONSTRATED,
IT IS
23 IMPOSSIBLE TO HOLD THE PUBLIC ON A MIDDLE
COURSE
24 FOR ANY LENGTH OF TIME."
25 AND I SUBMIT TO YOU THAT THEY HAVE MANAGED
TO DO
26 THAT FOR 50 YEARS. AND NOW, AS WE STAND HERE IN 2000,
MAYBE
27 THAT WILL CHANGE. BUT DURING THE COURSE OF THIS
TRIAL,
28 3,000 KIDS BEGAN SMOKING EVERY SINGLE DAY SINCE THIS
TRIAL
5434
1 BEGAN.
2 THEY GO ON TO SAY: "THERE SEEMS TO BE NO
WAY
3 THAT MASS PUBLIC OPINION CAN ENGAGE IN A
4 CONTROVERSY AND CHOOSE AN ANSWER THAT GOES
BEYOND
5 THE RANGE OF EITHER/OR."
6 EITHER IT'S SAFE OR IT'S NOT SAFE. THEY
TOOK THE
7 MIDDLE POSITION; IT'S NOT PROVED.
8 "IN THE CIGARETTE CONTROVERSY, THE PUBLIC
--
9 ESPECIALLY THOSE WHO ARE PRESENT AND
POTENTIAL
10 SUPPORTERS (FOR EXAMPLE, TOBACCO STATE
11 CONGRESSMEN AND HEAVY SMOKERS) -- MUST
PERCEIVE,
12 UNDERSTAND, AND BELIEVE IN EVIDENCE TO
SUSTAIN
13 THEIR OPINIONS THAT SMOKING MAY NOT BE THE
CAUSAL
14 FACTOR."
15 AND YOU HEARD THAT KIND OF TESTIMONY COME
FROM
16 THE STAND HERE. NO CLEAR-CUT ADMISSION.
17 "THUS, THERE ARE MILLIONS OF PEOPLE WHO
WOULD BE
18 RECEPTIVE TO A NEW MESSAGE STATING:
CIGARETTE
19 SMOKING MAY NOT BE THE HEALTH HAZARD THAT
THE
20 ANTISMOKING PEOPLE SAY IT IS BECAUSE OTHER
21 ALTERNATIVES ARE AT LEAST AS PROBABLE."
22 AND WHAT DID YOU HEAR IN THIS COURTROOM?
23 MARIJUANA; THAT MUST BE IT. SHE SMOKED SOME
MARIJUANA.
24 THAT MUST BE IT, NOT THE CIGARETTES. NOT EVEN AN
ADMISSION
25 THAT BOTH -- YOU KNOW, WE NEVER STOOD BEFORE YOU AND
SAID
26 THAT THE MARIJUANA MAY NOT HAVE CONTRIBUTED. WE SAID,
"THEY
27 HAVEN'T DONE THE CONCLUSIVE STUDIES. IT LOOKS LIKE
IT'S

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28 POINTING IN THAT DIRECTION. AND MAYBE IT'S A CAUSE." BUT
5435
1 THEY COULDN'T BRING THEMSELVES TO ADMIT THAT CIGARETTE
2 SMOKING WAS ALSO A CAUSE.
3 AND I SUBMIT TO YOU, IT WAS THE BIGGEST CAUSE,
4 THE LARGEST CAUSE, BUT THAT'S NOT WHAT YOUR BURDEN OR MY
5 BURDEN TO PROVE IS. IT'S JUST A SUBSTANTIAL CONTRIBUTING
6 FACTOR.
7 AND THAT GOES BACK TO SOMETHING THAT MR. BROWN
8 HAD SAID EARLIER. YOU HAVE TO GET TO THE ISSUE OF CAUSE
9 FROM ONE OF THE CAUSES OF ACTION. YOU'RE GOING TO SEE --
10 IT'S GOING TO MAKE YOU NOT SO HAPPY WHEN YOU SEE THIS
11 VERDICT, BECAUSE THERE'S LOTS OF QUESTIONS AND THERE'S LOTS
12 OF THINGS THAT YOU ARE GOING TO HAVE TO GO THROUGH AND WORK
13 YOUR WAY THROUGH.
14 WE'RE ALL CONFIDENT YOU CAN DO IT. SO I DON'T
15 WANT TO DISCOURAGE YOU ON THAT, BUT I JUST WANT TO GIVE YOU
16 WARNING. BUT THE ISSUE OF CAUSE IS, OF COURSE, A CRITICAL
17 ISSUE.
18 IF SMOKING DIDN'T CAUSE -- WASN'T A CAUSE OF THE
19 CANCER, YOU ARE NOT GOING TO GET TO THE RESULT OF LOOKING AT
20 THE APPORTIONMENT OF FAULT OR RESPONSIBILITY AT THE END.
21 AND LET ME JUST SHOW YOU, GIVE YOU AN EXAMPLE OF
22 WHAT I MEAN WITH THIS SPECIAL VERDICT FORM THAT YOU'RE GOING
23 TO GET. I'LL TAKE THE EASIEST ONE, IF I CAN. I'M JUST
24 GIVING YOU THIS AS AN EXAMPLE.
25 THIS IS IN SPECIAL VERDICT NO. 9 AGAINST
26 METALCLAD FOR THE CLAIM OF DEFECTIVE DESIGN:
27 "A PRODUCT THAT FAILS TO PERFORM AS SAFELY AS
28 THE ORDINARY CONSUMER WOULD EXPECT."
5436
1 I DON'T THINK THERE'S BEEN ANY TESTIMONY
2 OTHERWISE. NOBODY EXPECTS TO GO TO WORK AND WORK WITH A
3 PRODUCT, BRING IT HOME AND HAVE IT INJURE SOMEBODY. SO
4 THERE'S NO QUESTION THAT THAT'S THE CASE.
5 BUT I'M TALKING HERE ABOUT QUESTION NO. 3:
6 "WAS THE DEFECT IN DESIGN A CAUSE OF INJURY TO
7 LESLIE WHITELEY?"
8 NOW, YOU HAVE TO REACH A "YES" BEFORE YOU GET TO
9 APPORTIONMENT ON THE CAUSES OF ACTION. NOT EVERY ONE.

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AND THEN YOU LOOK AT SPECIAL VERDICT NO. 12, AND IT SAYS: "ASSUMING THAT 100 PERCENT REPRESENTS THE TOTAL CAUSES, SOME OF WHICH MAY BE ASBESTOS PRODUCTS, SOME OF WHICH MAY BE TOBACCO PRODUCTS, HOW MUCH OF THAT 100 PERCENT BELONGS TO PHILIP MORRIS, ASSUMING YOU FOUND AGAINST THEM, R.J. REYNOLDS, ASSUMING YOU FOUND AGAINST THEM, METALCLAD, ASSUMING YOU FOUND AGAINST THEM, OR OTHER ASBESTOS SUPPLIERS," SINCE THERE WAS SOME EVIDENCE THAT MR. WHITTEKER WAS EXPOSED TO SOME OTHER PEOPLE'S ASBESTOS PRODUCTS AS WELL.

NO PLACE, THOUGH, ON THIS IS LESLIE WHITELEY'S NAME. SO OF THAT 100 PERCENT, THERE'S NO ATTRIBUTION THERE TO HER.

BUT WHAT I WANTED TO SHOW YOU WITHIN THE CAUSE INSTRUCTION -- AND THIS IS A SIMPLE CONCEPT, A SUBSTANTIAL FACTOR -- IS THIS PART (INDICATING).

IF YOU FIND IT'S A SUBSTANTIAL CONTRIBUTING FACTOR, IT DOESN'T MATTER HERE WHETHER IT'S A HALF A

5437

PERCENT, 50 PERCENT, 90 PERCENT. THE PERCENTAGE DOESN'T MATTER, AS LONG AS YOU DETERMINE THAT IT'S A SUBSTANTIAL CONTRIBUTING FACTOR.

ASSUMING YOU DO, THIS IS WHERE THE NUMBERS MATTER (INDICATING). THIS IS WHERE YOU THEN GO: "WELL, YOU KNOW, THE ASBSESTOS TOTAL, YOU KNOW, WAS MAYBE A VERY SMALL CAUSE, 1 PERCENT, 5 PERCENT." MAYBE YOU SEE A 50-50 RESPONSIBILITY BETWEEN PHILIP MORRIS AND R.J. REYNOLDS OR MAYBE YOU SEE IT A LITTLE BIT DIFFERENT, BECAUSE OF WHEN LESLIE STARTED SMOKING AND WHICH BRAND SHE STARTED SMOKING.

BUT THAT'S THE CONCEPT BETWEEN -- YOU DON'T HAVE TO DECIDE PERCENTAGES WHEN YOU'RE TALKING ABOUT CAUSE. A CAUSE, IT DOESN'T MATTER HOW SMALL, AS LONG AS IT ISN'T SO TRIVIAL AS TO NOT HAVE MATTERED, TO NOT HAVE INCREASED RISK.

MR. ESCHER: OBJECTION, YOUR HONOR. THAT'S INAPPROPRIATE ARGUMENT.

THE COURT: SUSTAINED. THAT IS IMPROPER ARGUMENT. THAT'S NOT WHAT MY INSTRUCTION SAYS.

MR. ESCHER: I'D ASK FOR A CURATIVE INSTRUCTION ON THAT, YOUR HONOR.

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MS. CHABER: IT WAS A COMBINATION OF 3.76 AND 3.77.
THE COURT: DO YOU BOTH WANT ME TO REPEAT 3.76 AND 3.77?
MR. ESCHER: THAT WOULD BE FINE.
MS. CHABER: THAT'S FINE.
THE COURT: THAT'S WHAT THE LAW IS.
MR. ESCHER: THAT'S FINE.

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THE COURT: ALL RIGHT. THE REFERENCE THAT THE LAWYERS ARE MAKING TO 3.76 AND 3.77 WERE NOT THE INSTRUCTIONS. THAT'S JUST THE SHORTHAND. THAT'S LEGALESE.
BUT I WILL READ YOU TWO INSTRUCTIONS THEY BOTH ASKED ME TO REREAD TO YOU:
"THE LAW DEFINES CAUSE IN ITS OWN PARTICULAR WAY. A CAUSE OF INJURY, DAMAGE, LOSS OR HARM IS SOMETHING THAT IS A SUBSTANTIAL FACTOR IN BRINGING ABOUT AN INJURY, DAMAGE, LOSS OR HARM.
"THERE MAY BE MORE THAN ONE CAUSE OF AN INJURY.
WHEN NEGLIGENT OR WRONGFUL CONDUCT OF TWO OR MORE PERSONS OR NEGLIGENT OR WRONGFUL CONDUCT AND A DEFECTIVE PRODUCT CONTRIBUTE CONCURRENTLY AS CAUSES OF AN INJURY, THE CONDUCT OF EACH IS A CAUSE OF THE INJURY REGARDLESS OF THE EXTENT TO WHICH EACH CONTRIBUTES TO THE INJURY. A CAUSE IS CONCURRENT IF IT WAS OPERATIVE AT THE MOMENT OF INJURY AND ACTED WITH ANOTHER CAUSE TO PRODUCE THE INJURY. IT IS NO DEFENSE THAT THE NEGLIGENCE OR WRONGFUL CONDUCT OF A PERSON NOT JOINED AS A PARTY WAS ALSO A CAUSE OF THE INJURY."
ARE BOTH SIDES SATISFIED THAT THAT TAKES CARE OF THE DISPUTE BETWEEN YOU ON THIS?
MS. CHABER: YES, YOUR HONOR.
MR. ESCHER: YES, YOUR HONOR.
THE COURT: OKAY. YOU MAY PROCEED.
MS. CHABER: THANK YOU.
AND WHO NEEDS TO BE INFLUENCED IF WE PUT THIS

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PANEL OF PEOPLE TOGETHER, AND IT IS FAVORABLE?
"WE CAN FIND SOME OTHER THINGS THAT WE CAN BLAME. WE'LL GO TO THE SENATE, THE HOUSE, THE

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CABINET, THE WHITE HOUSE, STATE GOVERNORS,
MEDICAL SCHOOLS AND UNIVERSITY PRESIDENTS,
SCIENTIFIC BODIES."
THE PURPOSE BEING TWOFOLD. "TO GAIN THE SUPPORT
AND PARTICIPATION OF FRIENDS AND TO NEUTRALIZE
ANY ADVERSE ACTION THEY MAY BE BREWING."
AGAIN, IF THE RESULTS -- "ARE WE ARE GOING TO
CONDUCT A FULL-SCALE STUDY, FULL-SCALE SURVEY?"
AND AGAIN: "IF THE RESULTS ARE FAVORABLE, THEN
WE'LL RELEASE THEM AS A BOOK, HARD COVER,
PAPERBACK HOPEFULLY PUBLISHED BY A LEGITIMATE
HOUSE. IN EFFECT, SUCH A VOLUME WOULD BE A
COUNTER - THE SURGEON GENERAL'S REPORT."
NOW, IF YOU ARE COOPERATING WITH THE PUBLIC
HEALTH COMMUNITY, WHY DO YOU NEED TO COUNTER THE SURGEON
GENERAL'S REPORT?
AND THEN, OF COURSE, "THE ADVISORY PANEL --
HOPEFULLY BROADENED, WOULD WRITE THE
INTRODUCTION. THE INDUSTRY'S FUNDING ROLE WOULD
BE FULLY ACKNOWLEDGED."
NOW, REMEMBER, THAT'S ONLY IF THE RESULTS ARE
FAVORABLE.
"AS A BOOK THE MATERIAL WOULD BE MARKETED AND
PROMOTED IN ALL OF THE MANY WAYS AVAILABLE;
MAGAZINE CONDENSATION, TV AND RADIO TALK SHOWS,
5440
NEWSPAPER REVIEWS AND INTERVIEWS, ADVERTISING,
BEING GIFT DISTRIBUTION, ETCETERA, ETCETERA.
"AND BEST OF ALL, IT WOULD ONLY HAVE TO BE
SEEN -- NOT READ -- TO BE BELIEVED, JUST LIKE THE
SURGEON GENERAL'S REPORT."
THIS IS NOT COOPERATION WITH THE HEALTH
OFFICIALS.
AND I WANT TO GO BACKWARDS TO A POINT, BECAUSE I
WANT TO REMIND YOU OF THAT FRANK STATEMENT THAT APPEARED
NUMEROUS TIMES HERE. OF COURSE, I ALMOST LOST IT.
AND THAT WAS 363, AND ALSO 1936, WHICH WAS THE
VERSION THAT WAS IN THE SAN FRANCISCO CHRONICLE, THE
FULL-PAGE AD.
"A FRANK STATEMENT TO CIGARETTE SMOKERS," AND
HERE'S SOME LANGUAGE THAT'S INTERESTING.
"MEDICAL RESEARCH OF RECENT YEARS INDICATES MANY
POSSIBLE CAUSES OF LUNG CANCER. THERE IS NO
AGREEMENT AMONG THE AUTHORITIES WHAT THE

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CAUSE
19 IS. THERE IS NO PROOF THAT CIGARETTE
SMOKING IS
20 ONE OF THE CAUSES."
21 NOW, REMEMBER, THIS IS IN RESPONSE TO THE
CANCER
22 SCARE THAT EVERYBODY IS SUPPOSED TO BELIEVE. BUT HERE
IS
23 THIS OTHER SIDE. "THEY HAVEN'T DONE ALL THE RESEARCH.
24 THEY'RE BIASED. THEY'RE WHATEVER. THEY'RE ANTI-
SMOKING
25 PEOPLE. AND THERE IS NO PROOF THAT CIGARETTE SMOKING
IS ONE
26 OF THE CAUSES."
27 AND THEN THEY GO ON TO DISPUTE STATISTICS.
AND
28 THEN THEY SAY:
5441
1 "WE ACCEPT AN INTEREST IN PEOPLE'S HEALTH
AS A
2 BASIC RESPONSIBILITY, PARAMOUNT TO EVERY
OTHER
3 CONSIDERATION IN OUR BUSINESS. EVERY OTHER
4 CONSIDERATION IN OUR BUSINESS. PEOPLE'S
HEALTH
5 IS MORE IMPORTANT TO US THAN MAKING MONEY.
WE
6 BELIEVE THE PRODUCTS WE MAKE ARE NOT
INJURIOUS TO
7 HEALTH."
8 AND THEN THEY GO ON TO TALK ABOUT PLEDGING,
HOW
9 THEY'RE FORMING THIS GROUP.
10 AND I THINK THAT I SHOWED YOU ONE OF THE
DRAFTS.
11 IT'S PLAINTIFFS' EXHIBIT 401.01 THAT LED TO THE FRANK
12 STATEMENT.
13 AND IT WAS INTERESTING, BECAUSE WE KNOW
THAT
14 THERE WERE MEETINGS FOR SEVERAL DAYS. WE HEARD SOME
15 DEPOSITION TESTIMONY, READ OF ONE OF THE PRINCIPALS,
IRWIN
16 TUCKER, ONE OF THE PRESIDENTS AT THE MEETING. THEY'RE
ALL
17 THERE. THEY ALL GOT TOGETHER. THEY ALL BASICALLY HAD
INPUT
18 AND WROTE THIS UP, AND THEY ALL SIGNED OFF ON IT AND
TOLD
19 THE AMERICAN PEOPLE: "THIS IS WHERE WE STAND. WE
PROMISE
20 WE WILL COOPERATE. WE WILL FIND THE ANSWERS. OUR
PRODUCTS
21 AREN'T HAZARDOUS."
22 AND THE LINE THAT I FIND THE MOST
INTERESTING IN
23 THE DRAFT, THAT OF COURSE GOT CHANGED AND NEVER MADE
IT TO
24 THE OTHER -- TO WHAT WENT OUT TO THE PUBLIC:
25 "WE WILL NEVER PRODUCE AND MARKET A PRODUCT
26 SHOWN TO BE THE CAUSE OF ANY SERIOUS HUMAN
27 AILMENT."
28 ONE-IN-TWO PEOPLE DIE, 400,000 PEOPLE A
YEAR.

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THEY HAD TO CROSS THAT OUT, BECAUSE THAT WASN'T THEIR INTENTION. THEIR INTENTION WAS TO KEEP SELLING IT, WHETHER OR NOT IT WAS INJURIOUS TO HUMAN HEALTH.
AND THE REASON THAT I'M FOCUSING SO MUCH IN THE 1972, '73, '74 TIME PERIOD IS I WANT TO BRING YOU UP FROM THE 1950S, WHEN LESLIE'S MOM AND DAD WERE GROWING UP AND HEARING THE CONTROVERSY, INTO THE '60S, WHEN WE NOW HAVE LESLIE GROWING UP AND SEEING SMOKING AND SEEING ADVERTISING AND SEEING PEOPLE LOOK COOL AND GROWN-UP AND LIKE EVERY TEENAGER WANTING TO BE GROWN-UP.
'73 IS WHEN SHE STARTS -- I WILL TRY TO MAKE THIS BRIEF, BECAUSE WE'VE GOT QUITE A NUMBER OF THINGS TO COVER. LET ME JUST READ YOU A LITTLE BIT FROM -- THIS IS 1971. IT'S PLAINTIFFS' EXHIBIT 225.
AND WHAT YOU'LL HAVE IN THE EXHIBIT NUMBER IS THE TRANSCRIPT FROM THE PROGRAM "FACE THE NATION" AS BROADCAST OVER THE CBS TELEVISION NETWORK AND THE CBS RADIO NETWORK, RADIO AND TV ON JANUARY 3RD, 1971.
AND THE GUEST OF THE THREE QUESTIONERS -- ONE WHO WAS FROM CBS NEWS, ONE FROM THE WASHINGTON POST AND ONE THE SCIENCE EDITOR FROM CBS TV NEWS -- AND THE GUEST WAS JOSEPH F. CULLMAN III, CHAIRMAN OF THE BOARD, PHILIP MORRIS INCORPORATED.
I'M GOING TO READ YOU JUST A COUPLE OF THINGS HE SAID AND YOU CAN READ THE WHOLE DOCUMENT. YOU CAN READ THE WHOLE TRANSCRIPT. BECAUSE I KNOW WHEN THE DEFENSE GETS UP, THEY ARE GOING TO SAY, "SHE TOOK IT OUT CONTEXT. OF COURSE YOU CAN FIND BAD THINGS."
5443
SO YOU LOOK AT THE DOCUMENTS. THIS IS MR. CULLMAN: "WE ARE ALSO VERY CONCERNED ABOUT THE CHARGES LEVELED AGAINST OUR PRODUCT, AND WE ARE VERY ANXIOUS TO DO WHATEVER WE CAN TO CLEAR THE AIR IN THIS MATTER. WE HAPPEN TO BE OPTIMISTIC ABOUT THE FUTURE, AND WE HAPPEN TO FEEL THAT THIS IS A GREAT INDUSTRY, AND THAT THIS INDUSTRY CAN FACE

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THE FUTURE WITH CONFIDENCE BECAUSE WHEN, AS, AND
IF ANY INGREDIENT IN CIGARETTE SMOKE IS IDENTIFIED AS BEING INJURIOUS TO HUMAN HEALTH, WE
ARE CONFIDENT THAT WE CAN ELIMINATE THAT INGREDIENT."
HE'S THEN ASKED, FURTHER ON: "WELL, THERE ARE A
LOT OF PEOPLE WHO WOULD LIKE TO QUIT SMOKING AND
WHO MAY BE TOLD BY THEIR DOCTORS THAT THEY BETTER
QUIT SMOKING."
THE QUESTION IS PUT TO MR. CULLMAN: "WHAT ARE
YOU SPENDING ON FINDING WAYS TO MAKE TOBACCO,
CIGARETTE SMOKING, LESS ADDICTIVE?"
AND MR. CULLMAN SAYS: "WE HAVE NO PROGRAM THAT I
KNOW OF TO TRY TO HELP PEOPLE TO STOP SMOKING.
WE DO TALK TO THE QUESTION OF WHETHER OR NOT
CIGARETTES ARE HAZARDOUS. WE DO NOT BELIEVE THAT
CIGARETTES ARE HAZARDOUS. WE DON'T ACCEPT
THAT."
RIGHT BEFORE LESLIE STARTS SMOKING.
"BUT WE ARE WORKING WITH THE GOVERNMENT, WORKING
VERY HARD WITH THE GOVERNMENT, ON VARIOUS METHODS
5444
OF ASCERTAINING WHETHER OR NOT CIGARETTES CAN BE
FOUND TO BE HAZARDOUS."
AND THE QUESTION IS PUT: "DO YOU BELIEVE THAT
CIGARETTES ARE SAFE? HAVE THEY BEEN PROVED TO BE
SAFE, MR. CULLMAN?"
AND MR. CULLMAN RESPONDS: "I BELIEVE THEY HAVE
NOT BEEN PROVED TO BE UNSAFE."
THERE IS THAT MIDDLE GROUND. HASN'T BEEN
PROVED. "WE ARE NOT GOING TO PROVE IT'S SAFE. YOU'VE GOT
TO PROVE THAT THEY ARE UNSAFE."
AND HE'S EVEN ASKED ABOUT BABIES BEING BORN TO
MOTHERS, AND HE'S ASKED ABOUT HIGHER RATES OF STILLBIRTHS
AND DEATHS.
"MY QUESTION IS" -- THIS IS THE QUESTION PUT TO
HIM -- "IN VIEW OF THIS STUDY, WHICH IS THE
LARGEST AND THE MOST ELABORATE OF ITS KIND EVER
MADE, IS IT RIGHT TO PROMOTE SMOKING AMONG WOMEN
WITH VIRGINIA SLIMS AND THE OTHER BRANDS

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ESPECIALLY MARKETED FOR THEM WITH NO WARNING AS
TO THE DANGER TO THE EMBRYO THAT MAY EXIST?"
AND MR. CULLMAN SAYS: "I WOULD SAY THAT I DID
READ THAT REPORT, AND I CONCLUDED FROM THE REPORT
THAT IT'S TRUE THAT BABIES BORN FROM WOMEN WHO
SMOKE ARE SMALLER, BUT THEY ARE JUST AS HEALTHY
AS THE BABIES BORN TO WOMEN WHO DO NOT SMOKE.
SOME WOMEN WOULD PREFER HAVING SMALLER BABIES."
NOW, YOU HEARD A LOT OF DERISION AND A LOT OF
LAUGHTER BECAUSE LESLIE WHITELEY HAD THE NERVE TO SAY THAT
5445
COMMENT.
SHE DIDN'T MEAN SHE WANTED TO HARM HER CHILD.
SHE JUST MEANT, "WE HAVE BIG BABIES IN THIS FAMILY. THAT
DOESN'T SOUND SO BAD."
AND THEN MR. CULLMAN IS ASKED: "WHAT ABOUT THE
HIGHER RATE OF DEATH?"
AND HE SAYS: "I'M NOT FAMILIAR WITH THAT."
I'M JUST GOING TO READ YOU OFF SOME NUMBERS.
THOSE OF YOU WHO -- I KNOW THERE ARE NOTE-TAKERS AND THERE
ARE NOT NOTE-TAKERS, AND YOU ARE GOING TO HAVE ALL THE
EVIDENCE. I'M GOING TO READ YOU OFF SOME NUMBERS THAT I
THINK ARE SIGNIFICANT, AND I MIGHT STOP AND READ YOU A
SENTENCE OR TWO FROM THEM.
BUT AGAIN, YOU CHECK THE CONTEXT OUT. IF YOU
THINK I TAKE IT OUT OF CONTEXT, THEN I TOOK IT OUT OF
CONTEXT. YOU ARE THE ONES THAT WILL DECIDE THAT.
THIS IS A 1956 DOCUMENT: "THE HAZARDS OF
PUBLICATION MIGHT" --
MR. HARDY: EXCUSE ME. COULD WE HAVE THE
NUMBER, PLEASE.
MS. CHABER: I'M SORRY. 15. I TOLD YOU I WAS
GOING TO GIVE YOU THE NUMBER AND THEN I DIDN'T. IT'S
TALKING ABOUT A STUDY BEING DONE BY DR. PAUL KOTIN, ONE OF
THESE FUNDED STUDIES FROM THE INDUSTRY.
"THE HAZARDS OF PUBLICATION MIGHT BE A STATEMENT
THAT CERTAIN UNDESIRABLE CONSTITUENTS AND
PROPERTIES, SUCH AS BENZPYRENE, TOXIC MATERIALS
AND IRRITANTS ARE PRESENT IN CIGARETTE SMOKE.
5446
KOTIN'S GROUP HAS STRONG INDICATIONS THAT

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SMOKE
CONTAINS BENZPYRENE."
THEY ARE NERVOUS BECAUSE THIS WORK WAS DONE UNDER
A TIRC GRANT, AND IT'S PRESUMABLY GOING TO BE PUBLISHED.
HE SAYS "WELL, WE MIGHT GAIN SOMETHING FROM IT,
BUT EVEN IF SUCCESSFUL, IT IS PROBABLE THAT
VENTILATED CIGARETTES WOULD GIVE ONLY A PARTIAL
REDUCTION IN UNDESIRABLE PROPERTIES OF SMOKE."
1956. THAT'S WHEN THEY KNEW THAT.
AND THEN YOU HAVE CBS NEWS, 60 MINUTES, MARCH
3RD, 1974. LESLIE'S ALREADY BECOME A SMOKER.
AND YOU HAVE ON THAT PROGRAM, MR. JIM BOWLING --
MR. FURR: EXCUSE ME. NUMBER, PLEASE.
MS. CHABER: 103. AND MR. BOWLING IS THE VICE
PRESIDENT OF PHILIP MORRIS. AND HE IS ASKED:
"JUST 10 YEARS AGO" -- REMEMBER '74, 10 YEARS
BEFORE WOULD BE '64, THE 1964 SURGEON GENERAL'S REPORT.
"JUST 10 YEARS AGO, MR. BOWLING, THE SURGEON
GENERAL REPORTED CIGARETTES WERE A HEALTH
HAZARD. AND IT SOUNDED LIKE A DISASTER FOR THE
CIGARETTE FOLKS. YOU WERE OFFICIALLY LABELED A
PUBLIC ENEMY, A DISEASE CARRIER."
AND MR. BOWLING RESPONDS: "THE SURGEON GENERAL'S
REPORT OF 1964 WAS INDEED A GREAT BLOW TO A LOT
OF PEOPLE. PEOPLE HAVEN'T FORGOTTEN IT.
98
PERCENT OF THE AMERICAN PUBLIC IS OVERWHELMINGLY
AWARE OF ALL OF THE CHARGES THAT HAVE BEEN MADE
AGAINST CIGARETTES. AND CERTAINLY WE, MORE THAN
5447
ANYONE ELSE, ARE KEENLY AWARE OF IT. WE THINK
THE REAL CALL IS TO PUT THE MONEY INTO RESEARCH
TO FIND OUT THE CAUSES. AND AS MORAL PEOPLE, WE
WANT TO KNOW WHETHER OR NOT THE CHARGES AGAINST
CIGARETTES ARE TRUE. WE SPEND MORE MONEY ON
CIGARETTES AND HEALTH RESEARCH THAN ANYBODY IN AN
ATTEMPT TO FIND THE ANSWERS TO THAT BECAUSE WE
WANT TO FIND THE ANSWERS."

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AND THEN, THEY TALK ABOUT ADDICTION. AND MR.
BOWLING SAYS: "IT'S A MATTER OF INDIVIDUAL CHOICE. PEOPLE HAVE BEEN WARNED - THEY'VE BEEN
OVERWARNED - THEY'VE BEEN LIED TO ABOUT THE CIGARETTE AND HEALTH CONTROVERSY. I CHOOSE TO
SMOKE. I THINK I READ AS MUCH ABOUT IT AS ANYONE
ELSE. MY WIFE SMOKES. MY CHILDREN SMOKE."
AND MIKE WALLACE ASKED: "WHAT MOST CONCERNS THE
ANTISMOKERS IS THAT KIDS ARE TAKING UP THE HABIT
AT A GROWING RATE. WHAT MAKES THEM START?"
AND THE ANSWER FROM A RESEARCHER, ERNEST WYNDER,
ONE OF THE FIRST WHO DID THE STUDIES: "YOUNG
PEOPLE LIKE TO BE ADULTS AND SMOKING IS AN ADULT
HABIT, SO THEY MIMIC THE ADULT AND THEY BEGIN THE
HABIT. THAT'S HOW WE GET YOUNG PEOPLE TO SMOKE
CIGARETTES."
627. ACTUALLY I'M GOING TO READ -- LET ME SEE
THE DATES. 627. MAY 1ST, 1963, A RESPONSE TO A CUSTOMER
INQUIRY.
"LONG BEFORE THE ADVENT OF THE CURRENT
5448
ANTISMOKING CAMPAIGNS, OUR INDUSTRY ESTABLISHED
THE COUNCIL FOR TOBACCO RESEARCH TO SUPPORT
INDEPENDENT SCIENTIFIC RESEARCH IN A SINCERE
ATTEMPT TO DETERMINE WHAT ADVERSE EFFECTS, IF
ANY, SMOKING HAS UPON HUMAN HEALTH. MOREOVER,
FUNDS HAVE BEEN APPROPRIATED BY OUR INDUSTRY FOR
TOBACCO AND HEALTH RESEARCH GRANTS BEING
ADMINISTERED BY THE AMERICAN MEDICAL
ASSOCIATION. TO DATE, OVER $22 MILLION HAS BEEN
CONTRIBUTED BY OUR INDUSTRY TO SUPPORT RESEARCH
RELATED TO SMOKING AND HEALTH. DESPITE MANY
YEARS OF EXTENSIVE RESEARCH, MEDICAL SCIENCE HAS
BEEN UNABLE TO ESTABLISH THAT SMOKING HAS A
DIRECT CAUSAL LINK WITH ANY HUMAN DISEASE. WE
ARE FIRMLY OF THE OPINION, HOWEVER, THAT DEFINITE
ANSWERS TO THE MANY UNANSWERED SMOKING AND HEALTH
QUESTIONS AND THE TRUE CAUSES OF HUMAN

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DISEASE
18 CAN BE DETERMINED ONLY BY SCIENTIFIC
RESEARCH.
19 OUR COMPANY INTENDS, THEREFORE, TO CONTINUE
TO
20 SUPPORT SUCH RESEARCH UNTIL THE TRUTH IS
KNOWN."
21 THAT'S '63. WE MOVE TO 1972, DOCUMENT
1238.
22 THIS IS FROM R.J. REYNOLDS, APRIL 7TH, 1972, TO MR.
KENNETH
23 BERSINGER, FIFTH GRADE, ROOM 404, WILL ROGERS
ELEMENTARY
24 SCHOOL, 2401 14TH STREET, SANTA MONICA, CALIFORNIA
90405.
25 "DEAR MR. BERSINGER:" -- HE'S RESPONDING TO
THE
26 LETTERS THAT THE CLASS WROTE -- AND I WILL READ THE
LAST TWO
27 PARAGRAPHS?
28 "THE TOBACCO INDUSTRY IS MOST CONCERNED
ABOUT
5449
1 THE CHARGES BEING MADE THAT SMOKING IS
2 RESPONSIBLE FOR SO MANY SERIOUS DISEASES.
LONG
3 BEFORE THE PRESENT CRITICISM BEGAN, THE
TOBACCO
4 INDUSTRY, IN A SINCERE ATTEMPT TO DETERMINE
WHAT
5 HARMFUL EFFECTS, IF ANY, SMOKING MIGHT HAVE
ON
6 HUMAN HEALTH, ESTABLISHED THE COUNCIL FOR
TOBACCO
7 RESEARCH. THE INDUSTRY ALSO SUPPORTS
RESEARCH
8 GRANTS DIRECTED BY THE AMERICAN MEDICAL
9 ASSOCIATION."
10 AND THIS NEXT PARAGRAPH MUST SOUND VERY
11 FAMILIAR: "DESPITE ALL THE RESEARCH GOING ON" -- THIS
IS
12 NINE YEARS LATER -- "MEDICAL SCIENCE HAS
NOT
13 FOUND ANY CONCLUSIVE EVIDENCE THAT AN
ELEMENT IN
14 TOBACCO OR TOBACCO SMOKE CAUSES ANY HUMAN
15 DISEASE. THE ANSWERS TO THE MANY
UNANSWERED
16 SMOKING AND HEALTH QUESTIONS, AND THE TRUE
CAUSES
17 OF HUMAN DISEASES, CAN, WE BELIEVE, BE
DETERMINED
18 BY SCIENTIFIC RESEARCH. OUR COMPANY
INTENDS,
19 THEREFORE, TO CONTINUE TO SUPPORT SUCH
RESEARCH
20 UNTIL THE TRUTH IS KNOWN."
21 AND NOW I'M JUST GOING TO READ YOU SOME
NUMBERS.
22 DOCUMENT 362, A 1979 DOCUMENT ON THE CIGARETTE
CONSUMER
23 CONTROVERSY.
24 608, A PHILIP MORRIS DOCUMENT FROM 1992 ON

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25 TOBACCO ISSUES AND ANSWERS.
26 350 -- AND SOME OF THESE ARE GOING TO BE
OUT OF
27 ORDER IN TERMS OF DATES AND NUMBERS -- A 12-3-63 PRESS
28 RELEASE FROM THE TOBACCO INSTITUTE, "WHERE THE TOBACCO
5450
1 INDUSTRY STANDS." AND I KNOW YOU WILL BE SHOCKED, BUT
THEY
2 STAND THAT THERE'S A CONTROVERSY.
3 1013, "WHY WE'RE DROPPING THE NEW YORK
TIMES."
4 AND THIS IS FROM THE AMERICAN TOBACCO COMPANY,
9-4-1969.
5 "SURE, THERE ARE STATISTICS ASSOCIATING
LUNG
6 CANCER AND CIGARETTES. THERE ARE
STATISTICS
7 ASSOCIATING LUNG CANCER WITH DIVORCE, AND
EVEN
8 WITH LACK OF SLEEP. BUT NO SCIENTIST HAS
9 PRODUCED CLINICAL OR BIOLOGICAL PROOF THAT
10 CIGARETTES CAUSE THE DISEASES THEY ARE
ACCUSED OF
11 CAUSING. AFTER 15 YEARS OF TRYING, NOBODY
HAS
12 INDUCED LUNG CANCER IN ANIMALS WITH
CIGARETTE
13 SMOKE. WE BELIEVE THE ANTICIGARETTE THEORY
IS A
14 BUM RAP."
15 322, A 1964 DOCUMENT FROM HILL AND
KNOWLTON.
16 YOU'LL RECALL THEY ARE THE PUBLIC RELATIONS COUNSEL TO
THE
17 TOBACCO INDUSTRY SET UP IN THE FRANK STATEMENT.
THEY'RE
18 THE ONES WHO WROTE IT WITH THE PRESIDENTS.
19 516, WHICH IS AN ARTICLE FROM -- A MARCH
3RD,
20 1954 ARTICLE FROM A NEWSPAPER THAT: "THE CIGARETTE
INDUSTRY
21 WOULD STOP BUSINESS TOMORROW IF IT THOUGHT
ITS
22 PRODUCT WAS HARMING SMOKERS, ACCORDING TO
GEORGE
23 WEISSMAN, VICE PRESIDENT OF PHILIP MORRIS &
24 COMPANY, IN A SPEECH IN CHICAGO TODAY. HE
BLAMES
25 THE CANCER PROBLEM ON MEDICAL PROPAGANDA BY
A
26 NUMBER OF DOCTORS AND A LARGE NUMBER OF
MAGAZINES
27 AND NEWSPAPERS."
28 1122, A 1981 DOCUMENT. "THE PRIMARY
OBJECTIVE IS
5451
1 TO HAVE SMOKING FEATURED IN A PROMINENT
WAY."
2 386, A 1988 DOCUMENT FROM THE TOBACCO
INSTITUTE,
3 PRESS RELEASE: "CLAIMS THAT CIGARETTES ARE ADDICTIVE
4 CONTRADICT COMMON SENSE."
5 1941, FROM THE VENTURA STAR-FREE PRESS ON

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JANUARY
6 4TH, 1954, THE DAY THAT THE FRANK STATEMENT WAS
RELEASED:
7 "TOBACCO MEN BAND TOGETHER TO STUDY LUNG
CANCER
8 LINK." AND, OF COURSE, THEY INDICATE THAT
IT
9 HASN'T BEEN PROVED.
10 1937, ANOTHER ARTICLE FROM THE SAN
FRANCISCO
11 CHRONICLE.
12 414. 9-25-70: "THE QUESTION ABOUT SMOKING
AND
13 HEALTH IS STILL A QUESTION, AFTER MILLIONS
OF
14 DOLLARS AND OVER 20 YEARS OF RESEARCH."
AGAIN,
15 NO CAUSAL CONNECTION."
16 447, 2-95, TALKS ABOUT HOW THE FRANK
STATEMENT
17 GOT SET UP AND WHAT THE BACKGROUND WAS AND WHAT THE
PURPOSE
18 WAS, TO REASSURE SMOKERS, KEEP THEM SMOKING.
19 1298, A 1978 DOCUMENT CONCERNING THE ORIGIN
AND
20 PURPOSE OF THE TOBACCO INDUSTRY RESEARCH COMMITTEE AND
ITS
21 FUNCTIONS; AGAIN, TO REASSURE THE PUBLIC.
22 AND THAT'S WHAT HAS GONE ON AND HAS BEEN
GOING
23 ON.
24 NOW, LET ME TURN TO SOME OF THE JURY
INSTRUCTIONS
25 AND THE VERDICT FORM, TO GIVE YOU AN IDEA OF WHAT IT
IS THAT
26 YOU'RE GOING TO BE ASKED TO LOOK AT AND DO. I'M NOT
GOING
27 TO PUT EVERY ONE UP. I'LL PUT SOME UP SUBSEQUENTLY.
28 BUT YOU'LL START OUT WITH THE SPECIAL
VERDICT,
5452
1 NO. 1, AND YOU'LL GO THROUGH A SERIES OF QUESTIONS,
AND
2 WE'LL TALK ABOUT THOSE IN A MINUTE.
3 IF YOU ANSWER CERTAIN OF THEM "YES," YOU GO
ON TO
4 THE NEXT QUESTION. IF YOU DETERMINE THAT THE TOBACCO
5 COMPANIES ARE NOT NEGLIGENT, DID NOT NEGLIGENTLY FAIL
TO
6 WARN PRIOR TO JULY 1, 1969 -- MR. BROWN TOUCHED ON
THAT A
7 LITTLE BIT. IT'S ONLY A WARNING FOR A VERY SHORT
PERIOD OF
8 TIME, AND IT WAS VERY EQUIVOCAL -- YOU GO ON TO THE
NEXT
9 ONE, NEGLIGENCE IN DESIGN. MR. BROWN ALSO TALKED
ABOUT
10 THAT.
11 AND THEN YOU GO ON TO A SERIES OF QUESTIONS
THAT
12 ALL FALL UNDER THE GENERAL HEADING OF FRAUD. AND
UNDER THAT
13 GENERAL HEADING OF FRAUD, YOU HAVE INTENTIONAL

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MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, FALSE PROMISE AND CONCEALMENT.

NOW, THESE PARALLEL THE QUESTIONS ON THE VERDICT FORM. WE PUT THEM UP IN WHAT HOPEFULLY WAS AN EASIER WAY TO UNDERSTAND.

BUT YOU'RE GOING TO BE DEALING WITH THE SPECIAL VERDICT FORM AND THE EXACT PHRASEOLOGY OF THE QUESTIONS THERE. WE'RE TALKING ABOUT PAST OR EXISTING MATERIAL FACTS, MAKING A MISREPRESENTATION ABOUT THEM, OR WHILE UNDER NO DUTY TO SPEAK, THEY NEVERTHELESS DID SO BUT DID NOT SPEAK HONESTLY, MAKING MISLEADING STATEMENTS OR SUPPRESSED A FACT WHICH MATERIALLY QUALIFIED THAT STATED.

THEY HAVE TO KNOW IT WAS FALSE. I THINK THERE IS PLENTY OF EVIDENCE ON THAT. IN FACT, THEY BROUGHT PEOPLE IN WHO SAID: "WE WENT TO WORK THERE TO TRY TO MAKE A SAFER

5453

CIGARETTE. EVERYBODY KNEW INSIDE THE COMPANY AT THAT THESE THINGS CAUSED CANCER," AND SO FORTH.

CERTAINLY MISLEADING, THE STATEMENTS THAT I'VE JUST READ TO YOU AND OTHERS LIKE THEM.

OR THEY MAKE THEM RECKLESSLY, WITHOUT KNOWING WHETHER IT WAS TRUE OR FALSE. YOU KNOW, THERE WAS A WHOLE THING ABOUT WHOLE PRODUCT TESTING AND WHETHER OR NOT THEY EVER TOOK A MARLBORO CIGARETTE, A CAMEL CIGARETTE AND ACTUALLY DID TESTS ON THAT.

AND WE HEARD MAYBE THAT WAS HAPPENING NOW. WE HEARD THAT MAYBE IT WAS DONE TO THIS SORT OF GENERIC CIGARETTE. BUT THEY DON'T KNOW THAT THE PRODUCT IS SAFE. AND THAT'S RECKLESS TO PUT A PRODUCT OUT THERE WITHOUT THAT KIND OF TESTING.

AND YOU CAN BELIEVE DR. FARONE --

MR. FURR: OBJECTION, YOUR HONOR. IT'S A MISSTATEMENT OF LAW.

THE COURT: I THINK THAT'S A MATTER YOU CAN ARGUE. YOU CAN STATE YOUR POSITION IN THE LIGHT OF THE INSTRUCTIONS.

BOTH OF YOU CAN DO THAT, OBVIOUSLY.

MS. CHABER: THANK YOU, YOUR HONOR.

I THINK THERE'S CLEAR EVIDENCE THAT THERE WAS WHOLE PRODUCT TESTING DONE.

DR. FARONE SAID IT WAS ALL DONE OFFSHORE

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AND IT
26 WAS DONE OFFSHORE FOR A VERY GOOD REASON. THEY DID IT
IN
27 GERMANY, BECAUSE THERE WASN'T ANY WAY THAT LAWSUITS IN
THIS
28 COUNTRY COULD GET AHOLD OF THAT EVIDENCE, AND THEY
SAID
5454
1 THAT. AND THAT'S WHAT HE TESTIFIED TO. AND THERE ARE
2 DOCUMENTS THAT SUPPORT THAT.
3 AND THEN THEY BROUGHT IN SOME PEOPLE WHO
SAID,
4 "OH, NO. NO. NO. THAT ABSOLUTELY ISN'T TRUE. I SAW
5 THINGS FROM INBIFO AND THEY'RE THERE."
6 "WHERE ARE THEY?"
7 "WELL, THEY'RE IN INBIFO."
8 "WELL, INBIFO IS IN GERMANY."
9 BUT THEY NEVER BROUGHT ONE SINGLE ONE OF
THOSE
10 DOCUMENTS TO THIS COURTROOM. THEY BROUGHT A COUPLE OF
11 DOCUMENTS AND NOT ONE OF THEM WAS WHOLE PRODUCT
TESTING.
12 NOT ONE OF THEM WAS A TEST ON A MARLBORO OR ANY OTHER
13 CIGARETTE THAT PHILIP MORRIS MAKES.
14 AND THE REPRESENTATION -- THE
MISREPRESENTATION,
15 WHICH IS ALSO THIS HALF-TRUTH WE TALKED ABOUT. YOU
DON'T
16 HAVE TO SAY ANYTHING, BUT WHEN YOU DO, YOU BETTER SAY
THE
17 TRUTH, THE WHOLE TRUTH. YOU HAVE TO FIND THAT IT WAS
DONE
18 FOR THE PURPOSE OF INDUCING LESLIE WHITELEY TO RELY ON
IT
19 AND TO ACT OR REFRAIN FROM ACTING ON IT.
20 AND I WANT TO READ AN INSTRUCTION TO YOU --
READ
21 AN INSTRUCTION TO YOU THAT I THINK MIGHT HELP YOU
RESOLVE
22 THAT ISSUE.
23 "ONE WHO MAKES A MISREPRESENTATION" --
24 MR. HARDY: EXCUSE, ME COUNSEL. WOULD YOU
TELL
25 ME WHAT INSTRUCTION YOU'RE READING?
26 MS. CHABER: WELL, SINCE THEY ARE --
27 THE COURT: EXCUSE ME. SHE DOESN'T NEED
TO.
28 YOU CAN FIND THE INSTRUCTIONS ON THE PAGES.
5455
1 GO AHEAD.
2 MS. CHABER: THANK YOU.
3 MR. HARDY: COULD I JUST HAVE A PAGE
CITATION?
4 THE COURT: I'M SAYING SHE DOESN'T HAVE TO
GIVE
5 YOU A PAGE NUMBER. SHE'S SAYING YOU CAN FIND THESE
PAGES.
6 YOU ARE FAMILIAR WITH THESE INSTRUCTIONS.
7 GO AHEAD, MS. CHABER.
8 MS. CHABER: "ONE WHO MAKES A
MISREPRESENTATION
9 OR FALSE PROMISE OR CONCEALS A MATERIAL
FACT WITH

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THE INTENT TO DEFRAUD THE PUBLIC OR A PARTICULAR
CLASS OF PERSONS IS DEEMED TO HAVE INTENDED TO
DEFRAUD EVERY INDIVIDUAL IN THAT CATEGORY WHO IS
ACTUALLY MISLED THEREBY."
"THE FRAUD NEED NOT BE THE SOLE CAUSE" -- IT
DOESN'T HAVE TO BE THE ONLY REASON -- "IF IT
APPEARS THAT RELIANCE UPON THE REPRESENTATION OR
PROMISE SUBSTANTIALLY INFLUENCED SUCH PARTY'S
ACTION, EVEN THOUGH OTHER INFLUENCES OPERATED AS
WELL."
AND THIS IS WHAT LESLIE SAYS:
"QUESTION: AS A TEENAGER GROWING UP, DID YOU
BELIEVE THAT CIGARETTES COULD CAUSE SERIOUS
DISEASE?
"ANSWER: NO.
"QUESTION: DEATH?
"ANSWER: NO.
"QUESTION: CANCER?
"ANSWER: NO.
5456
"QUESTION: DID YOU THINK THAT CIGARETTES COULD
DO ANYTHING BAD TO YOU WHEN YOU WERE GROWING UP?
"ANSWER: YES. I THOUGHT THEY JUST GAVE YOU A
BAD COUGH BECAUSE I'D SEEN MY GRANDMOTHER
COUGHING.
"QUESTION: WHAT DO YOU MEAN YOU HAD SEEN YOUR
GRANDMOTHER COUGHING?
"ANSWER: IN THE MORNING, SHE WOULD COUGH,
BECAUSE SHE SMOKED, AND I FIGURED THAT'S WHAT
SMOKING DID AS YOU GOT OLDER.
"QUESTION: THAT YOU GOT A COUGH?
"ANSWER: YES.
"QUESTION: DID YOU EVER THINK THAT ANYTHING
MORE SERIOUS WOULD BE A CONSEQUENCE OF SMOKING
CIGARETTES THAN GETTING A COUGH?
"ANSWER: NO.
"QUESTION: AT THE TIME THAT YOU WERE SMOKING
CAMEL CIGARETTES -- WHEN DID YOU FIRST UNDERSTAND
THAT SMOKING CIGARETTES COULD CAUSE YOU SERIOUS
DISEASE?"
WE ARE TALKING ABOUT THE TIME PERIOD WHEN SHE
SWITCHED TO THE CAMEL LIGHTS AND THE CAMEL LIGHT 100S.
"ANSWER: THE DAY I WAS DIAGNOSED WITH

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CANCER.
"QUESTION: BEFORE THAT TIME PERIOD, DID YOU HAVE
ANY BELIEF AS TO WHETHER OR NOT THE MANUFACTURER
OF THE CIGARETTES YOU WERE SMOKING WOULD SELL
THEM IF THEY KNEW THAT THEY CAUSED SERIOUS INJURY
OR DEATH?
5457
"ANSWER: I DID NOT BELIEVE THAT THEY WOULD SELL
ME SOMETHING THAT WOULD KILL ME.
"QUESTION: DO YOU KNOW WHO MADE MARLBORO
CIGARETTES?
"ANSWER: PHILIP MORRIS.
"QUESTION: DID YOU HAVE ANY BELIEF THAT PHILIP
MORRIS WOULD SELL CIGARETTES IF THEY KNEW THAT
CIGARETTES COULD CAUSE SERIOUS INJURY OR DEATH?
"ANSWER: NO.
"QUESTION: YOU HAD A BELIEF THAT THE TOBACCO
COMPANIES HAD SAID IT WAS SAFE TO SMOKE; IS THAT
CORRECT?
"ANSWER: YES. I FEEL THEY MANUFACTURED
CIGARETTES, SO THEY MADE THEM, SO THEY KNEW WHAT
THEY DID TO PEOPLE OR DIDN'T DO TO PEOPLE, SO I
BELIEVED THEM.
"QUESTION: WHAT WAS THE SOURCE OR THE BASIS FOR
YOUR BELIEF THAT THE TOBACCO COMPANIES HAD SAID
IT WAS SAFE TO SMOKE?
"ANSWER: IT MUST HAVE BEEN A MEDIA -- OR TV, OR
I READ IT SOMEWHERE.
"QUESTION: DO YOU HAVE KNOWLEDGE OF SPECIFIC
TIME PERIODS OF REMEMBERING HEARING THIS?
"ANSWER: NO SPECIFIC TIME PERIODS.
"QUESTION: DO YOU HAVE A GENERAL KNOWLEDGE
ABOUT HAVING HEARD THAT THE TOBACCO COMPANIES
WERE SAYING IT WAS SAFE TO SMOKE?
"ANSWER: NO, JUST THAT I MUST HAVE READ IT OR
5458
HEARD IT ON THE RADIO OR TV, OR READ IT
SOMEWHERE. I CAN'T SAY WHEN.
"I AM SAYING I CAN'T TELL YOU SPECIFICALLY WHAT
I READ AND DIDN'T READ, BECAUSE I CAN'T
SPECIFICALLY ACTUALLY REMEMBER READING A PACK OF
CIGARETTES OR WHEN OR WHERE, AND EVEN SO, I

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DIDN'T BELIEVE. YOU GUYS SAID THAT THESE WERE
SAFE."
THAT'S LESLIE'S BELIEF STATE. AND WHAT THEY ARE
GOING TO TELL YOU IS THAT IT IS NOT JUSTIFIABLE OR
REASONABLE FOR LESLIE TO HAVE THAT BELIEF STATE, IN SPITE OF
THE FACT THAT THEY HAVE SPENT MILLIONS OF DOLLARS POLLUTING
THE AIRWAYS, GOING ON TV, PUTTING IN NEWSPAPERS, PASSING ON
TO OPINION MAKERS. YOU SAW THE LIST OF "WHO WE ARE GOING TO
TRY TO INFLUENCE," GETTING THE OTHER SIDE OF THE STORY OUT.
GETTING IT CALLED A CONTROVERSY.
THAT IN ITSELF IMPLIES THAT THERE IS SOME OTHER
SIDE.
AND THEY DID IT, AND THEY DID IT BECAUSE THEY
WANTED HER TO RELY, THEY WANTED THE PUBLIC TO RELY, THEY
WANTED TO SMOKERS TO KEEP SMOKING.
THEN, YOU MUST DETERMINE THAT AS A RESULT OF HER
RELIANCE, LESLIE WHITELEY MUST HAVE SUSTAINED DAMAGE.
I
DON'T THINK THERE IS ANY QUESTION IN THIS COURTROOM THAT
LESLIE, WHO IS GOING TO DIE SOON, WHOSE DISEASE HAS ALREADY
SPREAD TO OTHER PARTS OF HER BODY, HAS SUSTAINED DAMAGE AS A
RESULT OF BELIEVING THEM.
NOW, MAYBE SHE WAS STUPID TO BELIEVE THEM, BUT
5459
SHE DID. WHEN YOU'RE 13 YEARS OLD AND YOU DECIDE TO
EXERCISE FREE WILL OR FREE CHOICE TO SMOKE CIGARETTES, YOU
ARE NOT EXERCISING ADULT CHOICE. WE DON'T LET 13-YEAR-OLDS
MAKE LEGAL CONTRACTS. WE DON'T LET THEM GO INTO THE
MILITARY. WE DON'T LET THEM VOTE. AND THEY CERTAINLY
CANNOT MAKE CONTRACTS FOR THEIR ULTIMATE DEATH.
I DON'T KNOW A NICER WAY TO SAY THIS, SO I'M
GOING TO BE BLUNT. PHILIP MORRIS AND R.J. REYNOLDS ARE DRUG
PUSHERS. IT'S PLAIN AND IT'S SIMPLE. THEY SELL AN
ADDICTIVE SUBSTANCE. THEY KNOW THAT CHILDREN WILL START
SMOKING.
THERE ARE 50 DOCUMENTS THAT I COULD COME UP WITH
JUST OVERNIGHT THAT TALK ABOUT LOOKING AT 12-YEAR-OLDS,
13-YEAR-OLDS, GOING TO HANG-OUTS, SEEING WHO IS SMOKING,
WHAT THEY'RE DOING, WHAT BRANDS THEY'RE LIKING.
AND SO THEY HOOK CHILDREN, AND THEN THEY

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GET
17 CUSTOMERS FOR LIFE. NOT ALL CUSTOMERS, BECAUSE SOME
PEOPLE
18 DO QUIT. THERE'S NO QUESTION, AS TIME GOES ON, MORE
AND
19 MORE PEOPLE ARE QUITTING.
20 BUT THE INTERESTING THING IS THE PEOPLE WHO
WERE
21 BORN DURING THE TIME PERIOD THAT LESLIE WAS BORN AND
GREW UP
22 DURING THE '60S TIME PERIOD, WHEN VIRGINIA SLIMS,
"YOU'VE
23 COME A LONG WAY, BABY," SPONSORING TENNIS, A NICE
SPORT THAT
24 REQUIRES YOU TO HAVE WIND AND STAMINA, THAT IN THAT
GROUP OF
25 WOMEN, THE RATES OF SMOKING WERE GOING UP, EVEN AS
MEN'S
26 RATES WERE COMING DOWN.
27 AND THIS IS THE TIME PERIOD THAT STARTS THE
28 EPIDEMIC FOR LESLIE'S GENERATION. YOU KNOW, A BIG
DEAL WAS
5460
1 MADE, SHE WAS 38 YEARS OLD AND WHATEVER. WELL, WE ARE
JUST
2 GETTING TO THE LATENCY PERIOD. THIS IS A DISEASE
THAT'S
3 CAUSED OVER REPETITIVE TIME AND TAKES A LONG TIME TO
4 APPEAR. AND WE'RE NOW IN THE LATENCY. WE'RE AT THE
5 BEGINNING.
6 AND IT'S GOING TO GET MORE AND MORE AND
MORE EACH
7 YEAR, BECAUSE WE'VE LOOKED AT THOSE NUMBERS. YOU'VE
SEEN
8 THOSE PRESENTED. AND THE BAR CHARTS. AND THEY WENT
UP
9 HIGHER AND THEY WENT UP HIGHER AND THEY WENT UP
HIGHER.
10 AND OF COURSE, THE FURTHER OUT YOU GET, YOU
LOOK
11 AT 60-YEAR-OLD WOMEN. THEY HAVE REALLY HIGH RATES OF
LUNG
12 CANCER IF THEY'VE SMOKED. PART OF THAT IS BECAUSE
THEY'VE
13 BEEN SMOKING SINCE THEY WERE TEENAGERS. SO THEY'VE
GOT A
14 LONGER PACK YEAR HISTORY. THEY'VE GOT MORE INSULTS.
15 YOU KNOW, THEY COULD BLAME LESLIE FOR
BELIEVING
16 THEM, BUT SHE DIDN'T DO THIS ALONE. SHE ISN'T IN THIS
17 PREDICAMENT BY HERSELF. SHE WAS A VERY LOYAL CUSTOMER
TO
18 THEM AND THEY LIKED HER WHEN SHE WAS A LOYAL CUSTOMER.
THEY
19 EVEN SENT HER FREE CIGARETTES AND COUPONS TO GO BUY
MORE.
20 THEIR LOYALTY DOES NOT, HOWEVER, EXTEND TO
WHEN
21 THE PERSON GETS SICK. THEN, DESPITE ALL THE MONEY
THEY'VE
22 MADE FROM SELLING THOSE CIGARETTES, THEY SAY, "SORRY.
ALL
23 YOUR FAULT."

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AND I'M NOT TRYING TO SUGGEST TO YOU THAT LESLIE
IS BLAMELESS. SHE DID IT WITH THE HELP OF OTHERS. AND
THOSE "OTHERS" ARE THE TOBACCO COMPANIES.
MR. ESCHER: YOUR HONOR --
MS. CHABER: AND THEY --
5461
MR. ESCHER: YOUR HONOR. EXCUSE ME.
OBJECTION. IMPROPER ARGUMENT.
THE COURT: WHAT IS THE IMPROPER ARGUMENT? WHAT
IS IT THAT YOU ARE CLAIMING WAS IMPROPER ABOUT THE
ARGUMENT?
DO YOU WANT TO HAVE A SIDEBAR?
MR. ESCHER: YES, YOUR HONOR.
(COURT AND COUNSEL CONFER OUTSIDE
THE PRESENCE OF THE JURY)
MS. CHABER: YOU KNOW, YOUR HONOR, YOU DID SAY
SOMETHING ABOUT POSSIBLY TAKING A BREAK.
THE COURT: YES.
MS. CHABER: COULD WE HAVE A SHORT BREAK? YOU
KNOW, IF WE JUST TAKE FIVE MINUTES OF IT.
THE COURT: I INDICATED TO ALL COUNSEL THAT YOU
ARE THE ONES THAT CAN DETERMINE WHEN WE TAKE BREAKS.
MS. CHABER: I WASN'T FOCUSING ON THAT. I THINK
IT MIGHT BE A GOOD TIME.
THE COURT: LET'S TAKE OUR AFTERNOON RECESS, A
20-MINUTE RECESS UNTIL 3:20. JURORS, PLEASE CONTINUE TO
FOLLOW THE ADMONITION.
(RECESS TAKEN FROM 3:02 TO 3:25 P.M.)
THE COURT: WE ARE BACK ON THE RECORD.
BEFORE WE TOOK THE RECESS, I THINK THE RECORD
REFLECTS THERE WAS AN OBJECTION. WHERE DO WE STAND ON
THAT?
MR. ESCHER: YOUR HONOR, WE HAVE DECIDED TO
WITHDRAW THE OBJECTION.
5462
THE COURT: ALL RIGHT.
MS. CHABER: THANK YOU, YOUR HONOR.
YOU WILL BE HAPPY TO KNOW THAT WE HAVE STRICT
TIME LIMITS AND I ONLY HAVE ABOUT 10 OR 15 MORE MINUTES, SO
YOU WON'T HAVE TO LISTEN TO ME ALL AFTERNOON.
THERE ARE MANY CLAIMS THAT WE ARE MAKING HERE.
YOU WILL GET TO VOTE ON THOSE CLAIMS. NINE OR MORE OF YOU
NEED TO VOTE ON EACH CLAIM IN ORDER FOR US TO PREVAIL. IT
DOESN'T HAVE TO BE THE SAME NINE. EVERYBODY GETS TO DEAL
WITH EVERY QUESTION.
THERE ARE MANY CLAIMS, AS I SAID, THAT

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WE'RE
12 MAKING. I DO NOT HAVE THE TIME TO TAKE YOU THROUGH
ALL OF
13 THEM. THEY ARE -- IN ADDITION TO THE ONES WE HAVE
TALKED
14 ABOUT, THEY ARE CONCEALMENT BEFORE 1969, AND THEY ARE
FALSE
15 PROMISE.
16 I JUST WANT TO TALK TO YOU VERY, VERY
BRIEFLY
17 ABOUT FALSE PROMISE. FRAUD BY A FALSE PROMISE -- THIS
IS --
18 BY THE WAY, SOME OF THESE CLAIMS ARE LIMITED IN TIME
AND
19 SOME AREN'T. THE JURY INSTRUCTIONS AND THE SPECIAL
VERDICT
20 FORM ARE VERY CLEAR WHICH ONES YOU STOP AT 1969, WHICH
ONES
21 YOU GO BEYOND THAT TIME PERIOD. SO THIS IS NOT ONE
THAT IS
22 LIMITED IN TIME.
23 "A CLAIM OF FALSE PROMISE. THE DEFENDANTS
MUST
24 HAVE MADE A PROMISE AS TO A MATERIAL MATTER
AND,
25 AT THE TIME IT WAS MADE, THE DEFENDANTS
MUST HAVE
26 INTENDED NOT TO PERFORM IT."
27 WE START WITH THE FRANK STATEMENT. WE MOVE
28 THROUGH ALL OF THOSE DOCUMENTS I HAVE READ TO YOU.
THERE'S
5463
1 MORE EVIDENCE, MORE DOCUMENTS. AND BASICALLY, THAT
SMOKERS
2 WERE BEING -- WHAT SMOKERS WERE BEING TOLD IS: "WE'LL
GET
3 BACK TO YOU. THAT'S OUR PROMISE TO YOU. YOUR HEALTH
IS
4 PARAMOUNT TO EVERY CONCERN THAT WE HAVE."
5 AND AGAIN, IN EACH ONE OF THESE, YOU HAVE
TO FIND
6 THAT LESLIE RELIED ON IT AND THAT SHE WAS JUSTIFIED IN
HER
7 RELIANCE AND THAT IT CAUSED HER DAMAGE.
8 AND WE TALKED ABOUT -- AND I'M NOT GOING TO
GO
9 OVER ALL OF THOSE ARGUMENTS AGAIN. YOU'RE A SMART
JURY.
10 YOU'LL WORK YOUR WAY THROUGH THE FORMS AND THROUGH THE
11 INSTRUCTIONS. IT WILL TAKE TIME. BUT I KNOW YOU'LL
ABLE TO
12 DO IT.
13 SO I'M GOING TO SKIP NOW TO A PORTION THAT
MAKES
14 AN ASSUMPTION. AND THAT IS THE ASSUMPTION THAT YOU'LL
FIND
15 FOR THE PLAINTIFFS ON AT LEAST ONE CAUSE OF ACTION,
BECAUSE
16 OTHERWISE YOU DON'T DEAL WITH THIS PART OF IT, AND
THAT'S
17 THE ISSUES OF DAMAGES.
18 AND THE COURT HAS TOLD YOU THAT THE
STATEMENTS OF

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19 COUNSEL AND THE ARGUMENTS OF COUNSEL ARE NOT EVIDENCE UNLESS
20 IT'S A STIPULATION. THERE WERE STIPULATIONS MADE AS TO THE
21 AMOUNTS OF DAMAGES.
22 I DON'T WANT TO MISLEAD YOU. THE DEFENDANTS
23 DIDN'T STIPULATE THAT LESLIE IS ENTITLED TO THESE DAMAGES.
24 THEY'RE GOING TO VERY MUCH ARGUE SOMETHING ELSE.
25 IF YOU REACH THE ISSUE OF DAMAGES, THESE NUMBERS
26 ARE UNCONTESTED AND UNDISPUTED. IF YOU FIND FOR THE
27 PLAINTIFFS, THERE'S TWO TYPES OF DAMAGES. THERE'S ECONOMIC
28 DAMAGES. ECONOMIC DAMAGES, YOU KNOW, THE ONES THAT YOU CAN
5464
1 FIGURE OUT, CALCULATE PERFECTLY, THEY HAVE SOME CONNECTION
2 TO SOMETHING LIKE A MEDICAL BILL, LIKE THE COST OF SERVICE.
3 AND FOR THOSE ECONOMIC DAMAGES, THE MEDICAL
4 EXPENSES -- AND THIS WAS AS OF NOVEMBER -- NO. EXCUSE ME --
5 OCTOBER OF '99 WERE ALREADY AT $108,654.
6 AND THE TESTIMONY, AND AGAIN UNCONTESTED, IS THAT
7 LESLIE WHITELEY WILL INCUR FUTURE MEDICAL EXPENSES, THAT HER
8 CANCER WILL RECUR, WILL RECUR OTHER PLACES, THAT SHE'LL NEED
9 CHEMOTHERAPY, THAT SHE'LL NEED HOSPITALIZATION, THAT SHE
10 WILL NEED ALL OF THOSE KINDS OF THINGS.
11 AND THE ESTIMATE FOR THAT WAS BETWEEN 50 AND
12 100,000. I SUBMIT TO YOU, GIVEN HOW MUCH IT HAS COST TO
13 DATE, THE 100,000 NUMBER IS REASONABLE. THAT WILL BE UP TO
14 YOU.
15 AND IT'S ALSO UNDISPUTED THAT THE VALUE OF THE
16 LOSS OF HOUSEHOLD SERVICES -- EVERYBODY KIND OF WONDERS
17 ABOUT THAT. BUT, YOU KNOW, RAISING FOUR CHILDREN AND
18 RUNNING A HOUSE, THE COST OF REPLACEMENT. WE'RE NOT TALKING
19 ABOUT EMOTIONAL AND ALL THE OTHER KINDS OF COSTS OF
20 REPLACEMENT. WE'RE JUST TALKING ABOUT MINIMUM WAGE
21 REPLACEMENT.
22 LESLIE WOULD HAVE A 41-YEAR LIFE EXPECTANCY, A
23 LITTLE MORE THAN THAT. AND THAT, AGAIN, IS AN AVERAGE LIFE
24 EXPECTANCY. AND THE LOSS OF HOUSEHOLD SERVICES OVER THAT
25 TIME -- AND AGAIN, THE NUMBER IS UNDISPUTED -- IS $763,546.
26 AND I PUT DOWN "PRESENT VALUE," BECAUSE THERE WILL BE AN
27 INSTRUCTION THAT WILL SAY YOU HAVE TO LOOK AT TODAY'S

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DOLLARS, AND THAT'S ALREADY BEEN CALCULATED, THAT'S THIS
5465
NUMBER (INDICATING).
AND THE MEDICAL EXPENSES, WE KNOW, ARE GOING TO
HAVE OCCURRED IN THE PAST, SO YOU DON'T PUT PRESENT VALUE TO
THAT. AND THE ONES IN THE FUTURE ARE GOING TO BE SO NEAR IN
THE FUTURE THAT IT ISN'T GOING TO CHANGE.
THERE'S ANOTHER FORM OF COMPENSATION, AND THAT IS
WHAT I REFER TO AS THE NONECONOMIC COMPENSATION. AND THIS
IS THE ONE THAT DOES NOT HAVE A CALCULATOR ATTACHED TO IT.
THIS IS THE ONE THAT TALKS ABOUT PAIN, SUFFERING, MENTAL,
EMOTIONAL DISTRESS, FEAR, ALL THE THINGS THAT SHE'S GOING
THROUGH. AND THAT IS A SUM THAT I WILL LEAVE IN YOUR GOOD
HANDS TO DETERMINE, WHAT IS THE APPROPRIATE AMOUNT THAT A
PERSON SHOULD BE COMPENSATED FOR FOR DYING AT THE AGE OF 40,
WITH ALL OF THESE THINGS THAT HAVE HAPPENED TO HER AND WILL
HAPPEN TO HER IN THE NEAR TERM.
SO THAT'S A NUMBER. ANYTHING I GIVE YOU IS GOING
TO BE JUST ARGUMENT. YOU CAN'T DRAW LOTS, YOU CAN'T THROW
DICE, BUT THE REASONED MIND CAN COME UP WITH THAT NUMBER, IF
YOU FIND THAT LESLIE IS ENTITLED TO DAMAGES.
HER HUSBAND LEONARD, LEONARD ALSO HAS A CLAIM.
LEONARD IN SOME WAYS HAS A VERY DIFFICULT CLAIM. AND THAT'S
BECAUSE LEONARD'S LOSING LESLIE ON A DAILY BASIS. LEONARD
IS NOT GOING TO BE THE SAME PERSON WITHOUT LESLIE. AND HE'S
ENTITLED TO BE COMPENSATED FOR THE LOSS OF HER LOVE, HER
SOCIETY, HER COMFORT, HER CARE, HER COMPANIONSHIP, AND THOSE
ARE NOT SYNONYMOUS TERMS. EACH ONE MEANS SOMETHING ELSE.
AND ALL OF THOSE ARE LOSSES THAT HE WILL SUFFER BECAUSE OF
LESLIE'S ILLNESS AND INJURY.
5466
WE ALSO HAVE A CLAIM -- AND AGAIN, THAT'S A
NONECONOMIC DAMAGE. THERE ARE NO CALCULATORS TO DETERMINE
THAT. AND AGAIN, I WILL LEAVE -- ASSUMING YOU FIND FOR THE
PLAINTIFF, WHICH I BELIEVE YOU WILL, I WILL LEAVE THOSE
NUMBERS IN YOUR GOOD HANDS WITH YOUR 12 COLLECTIVE

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JUDGMENTS.
WE ALSO HAVE A CLAIM FOR CONSPIRACY. AND YOU'LL SEE LOTS OF INSTRUCTIONS ON THE CONSPIRACY, AND I DON'T HAVE TIME TO GO THROUGH THEM NOW WITH YOU. YOU CAN READ THEM.
I THINK IT'S VERY CLEAR THAT THESE COMPANIES DIDN'T ACT ALONE, BUT RATHER, ALL THE COMPANIES ACTED TOGETHER, BECAUSE IT WAS IN THEIR INTERESTS TO KEEP DOUBT, TO KEEP CONTROVERSY, TO KEEP THE ISSUE UNRESOLVED, BECAUSE THAT'S HOW THEY STAY IN BUSINESS AND THAT'S HOW THEY GET NEW SMOKERS TO START.
THE LAST CLAIM THAT I WANT TO TALK ABOUT IS ALSO A DAMAGE CLAIM, IF YOU MAKE CERTAIN FINDINGS. AND WE TALKED A LITTLE EARLIER ABOUT THE BURDEN OF PROOF AND THE PREPONDERANCE OF THE EVIDENCE. AND I MENTIONED REASONABLE DOUBT IN A CRIMINAL TRIAL.
WELL, THERE'S ANOTHER SORT OF INTERMEDIARY BURDEN OF PROOF, AND THAT'S CALLED CLEAR AND CONVINCING EVIDENCE.
"'CLEAR AND CONVINCING' EVIDENCE MEANS EVIDENCE OF SUCH CONVINCING FORCE THAT IT DEMONSTRATES, IN CONTRAST TO THE OPPOSING EVIDENCE, A HIGH PROBABILITY OF THE TRUTH OF THE FACTS FOR WHICH IT IS OFFERED AS PROOF."
SUCH EVIDENCE REQUIRES A HIGHER STANDARD OF PROOF

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THAN PROOF BY PREPONDERANCE OF THE EVIDENCE. IT'S STILL NOT TO THE LEVEL OF REASONABLE DOUBT, THOUGH.
AND THE CLAIM BASICALLY THAT WE ARE MAKING HERE IS THAT ALL OF THESE ACTS THAT I HAVE TALKED ABOUT, DOCUMENTS THAT YOU'LL BE ABLE TO LOOK THROUGH, THE TESTIMONY THAT YOU'VE HEARD, HAVE DEMONSTRATED DESPICABLE CONDUCT ON THE PART OF THESE DEFENDANTS. THEY DID NOT TAKE INTO CONSIDERATION PEOPLE'S HEALTH AS THEIR PARAMOUNT INTEREST BUT RATHER TOOK INTO CONSIDERATION ONE THING AND ONE THING ONLY, CONTINUED PROFITABILITY.
THERE ARE THREE DIFFERENT STANDARDS, ANY ONE OF WHICH LEADS TO A QUESTION ABOUT PUNITIVE DAMAGES. AND ONE OF THEM IS MALICE:
"CONDUCT WHICH IS INTENDED BY THE DEFENDANT TO

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CAUSE INJURY TO THE PLAINTIFF OR DESPICABLE CONDUCT WHICH IS CARRIED ON BY THE DEFENDANT" --

AND HERE IS WHAT I BELIEVE IS THE KEY LANGUAGE --

"WITH A WILLFUL AND CONSCIOUS DISREGARD FOR THE RIGHTS AND/OR SAFETY OF OTHERS. A PERSON ACTS WITH CONSCIOUS DISREGARD OF THE RIGHTS OR SAFETY OF OTHERS WHEN HE OR SHE IS AWARE OF THE PROBABLE DANGEROUS CONSEQUENCES OF HIS OR HER CONDUCT AND WILLFULLY AND DELIBERATELY FAILS TO AVOID THOSE CONSEQUENCES."

"'OPPRESSION'" -- YOU DON'T HAVE TO FIND ALL OF THESE. THESE ARE OR'S.

"'OPPRESSION' MEANS DESPICABLE CONDUCT THAT SUBJECTS A PERSON TO CRUEL AND UNJUST HARDSHIP IN

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CONSCIOUS DISREGARD OF THAT PERSON'S RIGHTS."

AND THEN, THERE IS FRAUD. NOW, YOU HEARD US TALKING ABOUT FRAUD BEFORE AND MANY OF OUR CLAIMS ARE FRAUD. FRAUD IS DEFINED DIFFERENT WAYS BY THE LAW, DEPENDING ON WHAT YOU'RE TALKING ABOUT.

"IN THE CONTEXT OF PUNITIVE DAMAGES, 'FRAUD' MEANS AN INTENTIONAL MISREPRESENTATION OR DECEIT WITH THE INTENTION ON THE PART OF THE DEFENDANT OF THEREBY DEPRIVING A PERSON OF PROPERTY OR LEGAL RIGHTS OR OTHERWISE CAUSING INJURY."

A MANUFACTURER IS SUPPOSED TO STAND BEHIND THE PRODUCTS THEY SELL.

MR. ESCHER: OBJECTION, YOUR HONOR. IMPROPER ARGUMENT.

THE COURT: THAT'S NOT WHAT MY INSTRUCTIONS SAY IN ALL CASES. THAT'S A BROADER STATEMENT THAN MY INSTRUCTIONS HERE. THE JURY HAS TO FOLLOW THE LAW AS I GIVE IT TO THEM.

THE ANSWER TO THAT IS IT DEPENDS ON WHETHER OR NOT IT FALLS WITHIN THE LANGUAGE OF THE INSTRUCTION.

MS. CHABER: THE DEFENDANTS, PHILIP MORRIS AND R.J. REYNOLDS, WERE MORE THAN HAPPY TO TAKE LESLIE WHITELEY'S MONEY WHEN SHE WAS BUYING THEIR CIGARETTES. AND WE SAY THAT THE TIME HAS COME FOR THEM TO PAY BACK SOME OF

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25 THE HARM THAT THEY HAVE CAUSED.
26 THANK YOU.
27 THE COURT: OKAY. WHO IS PROCEEDING?
28 MR. HARDY: I'M GOING TO GO NEXT, YOUR
HONOR.
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1 THE COURT: OKAY, MR. HARDY.
2 MR. HARDY: MAY I -- I DO NEED TO -- MAY I
3 INQUIRE WHAT THE COURT'S SCHEDULE IS? ARE WE STILL
QUITTING
4 AT 4:30?
5 THE COURT: I THINK WE ARE GOING TO HAVE
TO QUIT
6 AT CLOSE TO 4:30, AT SOME LOGICAL BREAKING POINT. I
WILL
7 LET YOU SELECT THE BREAK.
8 MR. HARDY: THANK YOU.
9 THE COURT: LET ME JUST SAY, WHY DON'T YOU
JUST
10 BE SURE THAT WE QUIT SOMETIME BETWEEN 4:30 AND 4:40,
IN THAT
11 RANGE.
12
13 CLOSING ARGUMENT BY MR. HARDY
14 MR. HARDY: OKAY. I WANT TO, I THINK,
SPEND
15 ABOUT HALF MY TIME TODAY AND THE OTHER HALF IN THE
MORNING.
16 I WILL START OFF BY THANKING EACH OF YOU,
FOR ME
17 AND FOR MY PARTNERS, LUCY MASON AND GERRY BARRON. I
THINK
18 EVERYBODY APPRECIATES, IN FACT, YOUR ATTENTIVENESS.
19 AND I KNOW THAT JURY SERVICE IS A DUTY, AN
20 OBLIGATION, BUT THERE ARE DIFFERENT LEVELS OF THAT
21 OBLIGATION AND YOU PICKED A TOUGH ONE, I KNOW, TWO
MONTHS.
22 AND I THINK THAT EVERYBODY FEELS LIKE
YOU'VE BEEN
23 VERY ATTENTIVE, AND I'M SURE THAT YOU'VE DONE YOUR
BEST TO
24 KEEP AN OPEN MIND TILL ALL THE EVIDENCE IS IN. AND
I'M
25 CONFIDENT, I THINK EVERYBODY IS CONFIDENT THAT
WHATEVER YOU
26 DECIDE, WHETHER YOU DECIDE IN FAVOR OF THE DEFENDANTS
OR YOU
27 DECIDE IN FAVOR OF THE WHITELEYS, THAT YOU WILL DO SO
BASED
28 ON THE EVIDENCE THAT YOU HAVE SEEN AND HEARD HERE IN
THE
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1 COURTROOM. AND THE TRUTH IS, THAT'S ALL WE HAVE ANY
RIGHT
2 TO ASK OF YOU AND THAT'S ALL WE ARE ASKING.
3 I WANT TO RETURN TO A COUPLE -- I'M GOING
TO SHOW
4 YOU SOME BOARDS THAT I SHOWED YOU IN OPENING
STATEMENTS,
5 BECAUSE I THINK THIS MAY RING SOME BELLS THAT DIDN'T
RING
6 WHEN WE STARTED, BECAUSE YOU HADN'T HEARD THE
EVIDENCE.

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AND I DON'T KNOW WHERE IS GOING TO BE THE RIGHT SPOT FOR THIS BOARD.

CAN EVERYBODY SEE THAT?

JUROR NO. 6: NO.

MR. HARDY: ALL RIGHT. THEN I WILL TRY AGAIN.

I HATE TO CUT OFF, JUDITH, BUT I'VE GOT TO DO IT.

NOW CAN EVERYBODY SEE?

MS. CHABER: YOUR HONOR, I HATE TO INTERRUPT COUNSEL, BUT I HAVE AN OBJECTION. I THOUGHT THAT WE HAD AN UNDERSTANDING WITH RESPECT TO THE USE OF DEMONSTRATIVES.

THE COURT: OKAY. TO BE HONEST WITH YOU, THAT WAS AN ARRANGEMENT YOU MADE BETWEEN YOURSELVES. I DON'T KNOW WHAT IT IS. SO IF THERE'S A DISPUTE ABOUT IT, I'M GOING TO HAVE TALK TO YOU ABOUT IT AND FIND OUT WHAT IT WAS.

MR. HARDY: LET'S DO THAT.

THE COURT: THAT WAS DONE AMONG COUNSEL.

MR. HARDY: LET'S GO TALK ABOUT IT.

THE COURT: OKAY.

(COURT AND COUNSEL CONFER OUTSIDE THE PRESENCE OF THE JURY)

THE COURT: JURORS, EVEN THOUGH I CAN'T SEE YOU, I ASSUME YOU'RE ALL THERE.

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THE LAWYERS GOT INTO A LITTLE BIT OF A GOOD FAITH DISPUTE, GOOD FAITH ON BOTH OF THEIR PARTS, ABOUT WHETHER BOARDS WOULD BE USED OR NOT USED, AND IF SO, WHAT COULD BE SHOWN TO THE JURY.

I AM GOING TO NEED TO SPEND A FEW MINUTES WITH THEM TO RESOLVE THAT, BECAUSE I THOUGHT I HAD LEFT THAT TO THEM TO WORK OUT. BUT APPARENTLY, EVERYBODY, ACTING IN GOOD FAITH, HAS A LITTLE DIFFERENT VIEW ON WHAT OCCURRED ON THE SUBJECT OF BOARDS.

I'M GOING TO NEED TAKE A FEW MINUTES. WE MIGHT AS WELL, IT BEING 4:00 O'CLOCK, LET YOU GO FOR THE DAY.

THERE IS NO POINT HAVING YOU SIT FOR 15, 20 MINUTES WHILE WE TALK ABOUT BOARDS.

SO OVER THE EVENING, PLEASE CONTINUE TO FOLLOW THE ADMONITION. IT'S ABSOLUTELY CRITICAL THAT YOU DO SO.

HAVE A GOOD EVENING.

I DO WANT TO START AT 9:00 O'CLOCK SHARP TOMORROW. I'M STILL HOPEFUL, ALTHOUGH I HAVEN'T DONE

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ALL
19 THE TIME CALCULATIONS, THAT WE CAN FINISH THE
ARGUMENTS BY
20 THE END OF THE DAY TOMORROW, BUT IT'S GOING TO BE
CRITICAL
21 THAT WE START AT 9:00.
22 AND, IN FACT, COUNSEL, LET ME JUST SUGGEST
23 SOMETHING TO YOU. I THINK MAYBE, JUST TO BE SAFE, WE
OUGHT
24 TO START AT QUARTER TO 9:00, IF ALL THE JURORS CAN BE
HERE.
25 IS THERE ANY JUROR THAT CAN'T BE HERE AT
QUARTER
26 TO 9:00? I REALLY WANT TO MAKE AN EFFORT TO FINISH
THESE
27 ARGUMENTS. I CAN'T SEE YOU ALL, BUT IF YOU HAVE A
PROBLEM
28 WITH THIS, WOULD YOU SPEAK UP? DO I HEAR ANYTHING?
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1 NO. OKAY. THEN WOULD YOU BE GOOD ENOUGH
TO BE
2 HERE AT QUARTER TO 9:00. WE'LL START AT QUARTER TO
9:00
3 TOMORROW.
4 HAVE A GOOD EVENING. WE'LL SEE YOU AT
QUARTER TO
5 9:00.
6 (THE PROCEEDINGS ADJOURNED AT 4:00 P.M.)
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